OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 441 F.3d 370 (6th Cir. 2006), and is reproduced in the appendix to this petition at A1. The final opinion of the district court is reported at 354 F. Supp. 2d 770 (M.D. Tenn. 2004), and is reproduced in the appendix at A46. The district court's earlier unpublished memorandum denying the State's motion to dismiss is reproduced in the appendix at A55.

JURISDICTION

On March 17, 2006, the court of appeals issued its final decision on the merits. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the court of appeals.

STATUTORY PROVISIONS

Pertinent portions of Tennessee Code § 55-4-306 are reprinted below, and the entire statute, including the provisions listing the authorized private recipients of the funds raised from the "Choose Life" license plates, is reprinted in the appendix at A63-A69:

(a) An owner or lessee of a motor vehicle who is a resident of this state, upon complying with state motor vehicle laws relating to registration and licensing of motor vehicles and paying the regular fee applicable to the motor vehicle and the fee provided for in § 55-4-203, shall be issued a Choose Life new specialty earmarked license plate for a motor vehicle authorized by § 55-4-210(c).

(b) The new specialty earmarked license plates provided for in this section shall contain an appropriate logo and design. Such plates shall be designed in consultation with a representative of New Life Resources.

(c) The funds produced from the sale of Choose Life new specialty earmarked license plates shall be allocated to New Life Resources in accordance with the provisions of § 55-4-215. Such funds shall be used exclusively for counseling and financial assistance, including food, clothing, and medical assistance for pregnant women in Tennessee.

The full text of Tennessee Code §§ 55-4-201, -203, -215, which govern the specialty plate program, are set forth in the appendix at A70-A84. In addition, a full list of the specialty license plates referenced in Petitioners' complaint is included in the appendix at A85-A90.

STATEMENT OF THE CASE

This is an appeal from a decision of the Sixth Circuit upholding the constitutionality of Tennessee's "Choose Life" license plate law. *See* TENN. CODE ANN. § 55-4-306(a) ("the Act"), App. To Pet. For Writ of Cert. (hereinafter "Pet. App.") A63. Under the Act, Tennessee vehicle owners who oppose abortion may express that view on their specialty license plates. That option is not available to vehicle owners who believe in preserving a woman's right to choose, because the Tennessee legislature has twice rejected amendments that would

have provided for pro-choice specialty license plates.[2] Pet. App. A4, A48; *see also* (R. 97 Plaintiffs' Statement of Undisputed Facts ¶¶ 23-26; R. 112 Defendant-Intervenor New Life Resources, Inc.'s Response to Plaintiffs' Statement of Undisputed Facts ¶¶ 23-26; R. 105 Defendant's Response to Statement of Undisputed Facts ¶¶ 23-26). In direct conflict with the Fourth Circuit, the Sixth Circuit held that this viewpoint discrimination does not violate the First Amendment to the United States Constitution because the messages on Tennessee's specialty license plates constitute pure government speech.

Factual Background

In 2003, Tennessee authorized for the first time a "new specialty earmarked license plate" with a "Choose Life" slogan. TENN. CODE ANN. § 55-4-306(a), Pet. App. A63. During legislative consideration of the Act, Senator Ford of Memphis offered an amendment that would have authorized at the same time a pro-choice specialty license plate. That amendment was defeated. The following year, an amendment authorizing "Pro-Choice" specialty license plates was again proposed and again rejected. (R. 97 Plaintiffs' Statement of Undisputed Facts ¶¶ 23-26; R. 112 Defendant-Intervenor New Life Resources, Inc.'s Response to Plaintiffs' Statement of Undisputed Facts ¶¶

[2] In Tennessee, residents seeking the production of a specialty license plate have no administrative or other alternative to the legislative process. *See* Pet. App. A60 (noting that the Tennessee specialty license plate scheme gives "discretion . . . to adopt or not adopt statutes authorizing specialty license plates" to the Tennessee legislature).

23-26; R. 105 Defendant's Response to Statement of Undisputed Facts ¶¶ 23-26).

Vehicle owners must pay $35 per year for the "Choose Life" license plate in addition to their regular vehicle registration fee. TENN. CODE ANN. § 55-4-203(d), Pet. App. A81. This requirement of an additional payment, on top of the usual registration fee, applies to specialty license plates in general. *See* TENN. CODE ANN. § 55-4-203(d), Pet. App. A81.

The "Choose Life" specialty license plate is one of approximately 100 specialty plates that have been authorized by the Tennessee legislature. *See* TENN. CODE ANN. §§ 55-4-228, -230 to -240, -242 to -323, Pet. App. A85-A90 (listing authorized specialty license plates); *see also* Tennessee Department of Safety, *Specialty Plates Main Menu*, http://www.state.tn.us/safety/plates.html (last visited Apr. 17, 2006) (listing and displaying currently available specialty license plates); Pet. App. A26-A27 & n.5 (Martin, J., concurring in part and dissenting in part) (listing specialty plates and noting that "[t]he organizations with specialty plates are numerous and diverse").[3] Although the statutes creating specialty license plates differ in certain respects, such as the amount of the annual fee, all of the statutes enable some kind of expression by Tennessee residents. For example,

[3] The appendix lists a total of 99 specialty license plates statutes that have been passed by the Tennessee legislature. *See* Pet. App. A85-A90. Several of these statutes authorize the issuance of more than one plate. *See, e g* , TENN. CODE ANN. § 55-4-253 (authorizing different specialty plates for veterans of five separate military conflicts); *id.* § 55-4-261 (authorizing different specialty plates for members and alumni of eight sororities and fraternities).

among the specialty plates that have been authorized by the Tennessee legislature are license plates allowing Tennessee drivers to express support for a favored organization or association on their automobiles. *See, e.g.*, TENN. CODE ANN. § 55-4-234 (Fellowship of Christian Athletes); *id.* § 55-4-257 (Sons of Confederate Veterans); *id.* § 55-4-301 (Prince Hall Masons); *id.* § 55-4-320 (Tennessee Council of Boy Scouts). Several of these plates are only available to individuals who prove membership in a given group. *See, e.g.*, *id.* § 55-4-261 (sororities and fraternities); *id.* § 55-4-265 (Ducks Unlimited). Other license plates allow Tennessee drivers to express support for a particular institution on their motor vehicles. *See, e.g.*, *id.* § 55-4-247 (Penn State University); *id.* § 55-4-250 (University of Florida); *id.* § 55-4-263 (St. Jude Children's Research Hospital). Still others allow Tennessee drivers to express a slogan or support a cause. *See, e.g.*, *id.* § 55-4-266 (small mouth bass); *id.* § 55-4-272 (Olympics); *id.* § 55-4-290 (animal friendly); *id.* § 55-4-316 (American Cancer Society Relay for Life).

The description of the specialty license plate program contained in the State's application materials makes clear that the plates involve private expression. The application invites drivers to "SHOW *YOUR* SCHOOL SPIRIT" and "SUPPORT *YOUR* CAUSE AND COMMUNITY." Tennessee Department of Safety, *Application*, http://www.tennessee.gov/safety/forms/platesapplication.pdf (last visited Apr. 17, 2006) (emphasis added); *see also* Pet. App. A28-A29 (Martin, J., concurring in part and dissenting in part) (quoting same). The application further states, "Tennessee motorists have the opportunity

to display *their* school spirit and contribute to various programs of special interest when renewing their vehicle registration." Tennessee Department of Safety, *Application* (emphasis added). Similarly, an official press release from the Department of Safety announcing a new standard-issue Tennessee plate notes that, in addition to the standard plate, "the state currently issues nearly 150 different license plates to reflect *drivers' special interests*, such as schools, wildlife preservation, parks, the arts and children's hospitals." Tennessee Department of Safety, *Bredesen Unveils New State License Plate*, http://www.tennessee.gov/safety/newsreleases/newplate.htm (last visited Apr. 17, 2006) (emphasis added); *see also* Pet. App. A29 (Martin, J., concurring in part and dissenting in part) (quoting same).

The Commissioner of Safety may issue the "Choose Life" specialty license plate – and other specialty license plates like it – only after a minimum of 1000 vehicle owners have ordered the plate. TENN. CODE ANN. § 55-4-201(h)(1), Pet. App. A73-A74.[4] The Tennessee legislature has passed enabling legislation for specialty license plates that either have never been produced at all, or have not been renewed, because an insufficient number of Tennessee drivers proved interested in expressing the message. *See* TENN. CODE ANN. § 55-4-201(h)(1), Pet. App. A73-A74 (providing that any specialty plate among specified categories that does not meet the minimum order requirements "within one (1) year of the effective date of the act authorizing

[4] According to New Life Resources, this minimum order has been met for the "Choose Life" plate. (R. 26 New Life Resources Mot. Intervene ¶ 3.)

such plate, or does not meet the renewal requirements for any two (2) successive renewal periods thereafter, shall not be issued, reissued or renewed and shall be deemed obsolete and invalid"); *see also* TENN. CODE ANN. § 55-4-201(c)(1), Pet. App. A71. Plates supporting a wide range of causes have been rendered obsolete due to a lack of interest from Tennessee drivers. *See, e.g.*, TENN. CODE ANN. § 55-4-254 (2003) (civil rights); *id.* § 55-4-278 (2003) (Proud To Be An American); *id.* § 55-4-319 (2003) (organ donation awareness).

By statute, fifty percent of all funds raised by the sale of the "Choose Life" plates, after expenses, are allocated to a private organization, New Life Resources, which will in turn distribute the funds to other private entities for "counseling and financial assistance . . . for pregnant women in Tennessee." *Id.* § 55-4-306(c), (d), Pet. App. A63-A69; *see* TENN. CODE ANN. § 55-4-215(a)(1), Pet. App. A82. Of the remaining fifty percent of funds raised, forty percent are allocated to the Tennessee Arts Commission, and ten percent to the State highway fund. TENN. CODE ANN. § 55-4-215(a)(2), (3), Pet. App. A82-A83. The Act also provides that the "Choose Life" plate will be designed "in consultation with a representative of New Life Resources." TENN. CODE ANN. § 55-4-306(b), Pet. App. A63.

Procedural Background

On November 6, 2003, Petitioners filed this action challenging, under the First and Fourteenth Amendments to the United States Constitution, the constitutionality of the Act and, alternatively, Tennessee's policy and practice of issuing specialty license plates, *id.* §§ 55-4-

228 to -323 ("scheme"). *See* Pet. App. A47. More specifically, Petitioners contended that Tennessee has engaged in impermissible viewpoint discrimination by allowing only one side of the abortion debate access to a government-created forum that was designed to promote private speech. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 to hear Petitioners' claims.

Petitioners sued Tennessee Governor Philip Bredesen and Commissioner of Public Safety Fred Phillips ("the State Defendants") in their official capacity.[5] Pet. App. A47. New Life Resources intervened as a defendant, asserting that it was a financial beneficiary under the Act. Pet. App. A48.[6]

On September 24, 2004, the district court granted Petitioners' motion for summary judgment, denied the State Defendants' and Intervenor's motions for summary judgment, and permanently enjoined enforcement of the Act. Pet. App. A46-A47, A53-A54. As an initial matter, the district court rejected the argument that the license plate constitutes pure government speech. In so doing, it relied on several license plate cases, including the Fourth Circuit decision invalidating South Carolina's "Choose Life" license plate. *See Planned Parenthood of South*

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[5] Fred Phillips is no longer the Tennessee Commissioner of Public Safety. His successor, Interim Commissioner of Public Safety Gerald F. Nicely, is substituted in his place in this litigation. *See, supra* note 1, at ii.

[6] Friends of Great Smoky Mountains National Park, Inc. also intervened as a Defendant in the district court, but did not appeal the district court's decision. *See supra* at ii.

Carolina, Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004) (*PPSC*), *reh'g en banc denied*, 373 F.3d 580, *cert. denied*, 543 U.S. 1119 (2005). The district court agreed with the Fourth Circuit's conclusion that "'the speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two.'" Pet. App. A51 (quoting *PPSC*, 361 F.3d at 794).

The district court then held that the Act impermissibly discriminates based on viewpoint. The court reasoned that, in violation of the First Amendment, "the State of Tennessee has allowed the 'Choose Life' viewpoint to the exclusion of 'Pro-Choice' and other views on abortion." Pet. App. A52. The district court did not reach Petitioners' challenge, in the alternative, to Tennessee's entire specialty license plate scheme.

On October 25, 2004, Intervenor New Life Resources filed a Notice of Appeal in the Sixth Circuit. The State Defendants did not appeal the district court's decision. Instead, the State Defendants proceeded, like Petitioners, as appellees, arguing only that the court of appeals need not address the constitutionality of the entire specialty license plate scheme. *See* Pet. App. A5; *see also* Pet. App. A24 n.3 (Martin, J., concurring in part and dissenting in part) ("The state acquiesced in the district court's decision and has appeared solely in response to the intervenors to request that we not strike down the entire license plate program. The party advocating the Choose Life license plate is a *private* organization.") (emphasis in original).

In the court of appeals, Intervenor New Life Resources contended both that the "Choose Life"

specialty plates are pure government speech, and, for the first time, that the Tax Injunction Act deprives the federal courts of jurisdiction to hear Petitioners' challenge. On March 17, 2006, the Sixth Circuit issued its decision. The court unanimously rejected Intervenor's Tax Injunction Act argument. Pet. App. A5-A10; Pet. App. A22 (Martin, J., concurring in part and dissenting in part). However, two judges joined in reversing the district court's decision on the First Amendment, reasoning that the Act's viewpoint discrimination is permissible because the "Choose Life" message is purely government speech. Pet. App. A10-A14. The majority relied heavily on this Court's decision in *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 125 S. Ct. 2055 (2005), which, the Sixth Circuit majority held, "requires the court to conclude that 'Choose Life' is Tennessee's message because the Act determines the overarching message and Tennessee approves every word on such plates." Pet. App. A11. Although the majority recognized "that the Fourth Circuit has invalidated a nearly identical specialty license plate law in South Carolina," it concluded that the Fourth Circuit's decision in *PPSC* was unpersuasive because it was announced before *Johanns*. Pet. App. A21.

Judge Martin dissented, concluding that "Tennessee created a forum to encourage a diversity of viewpoints from private speakers and therefore the Constitution requires viewpoint neutrality." Pet. App. A41 (Martin, J., concurring in part and dissenting in part). Judge Martin noted that the majority's decision conflicted not only with the Fourth Circuit's decision in *PPSC*, but with a recent Second Circuit decision as well. Pet. App. A22 n.1 (citing *Children First Found., Inc. v. Martinez*,

Nos. 05-0567-CV, 05-1979-CV, 2006 WL 544502, at *1 (2d Cir. Mar. 6, 2006) (unpublished)). Judge Martin also criticized the majority's application of *Johanns*, reasoning that "[t]he government speech doctrine, as it is used in *Johanns*, is more appropriately utilized in the compelled subsidy context." Pet. App. A35. Because the "Choose Life" plates do not involve any compulsion, he concluded that "*Johanns* is not determinative." Pet. App. A36.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari in this case for at least four reasons. First, the Sixth Circuit's decision is in direct conflict with the Fourth Circuit's decision in *PPSC*, 361 F.3d 786, which held that specialty license plates implicate private speech rights such that viewpoint neutrality is required. This conflict should be resolved by this Court.[7] *See* Sup. Ct. R. 10(a).

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[7] In his dissent below, Judge Martin cited an additional conflict with the Second Circuit's decision in *Children First Foundation, Inc. v Martinez, supra*. Although *Martinez* is a summary order that lacks precedential authority under the Second Circuit's rules, the decision indicates a further divide in the circuits on the question at the heart of this case, as Judge Martin noted. Pet. App. 22 n.1 (Martin, J., concurring in part and dissenting in part). Assessing New York's refusal to allow a "Choose Life" plate in the context of a qualified immunity claim, the Second Circuit observed that "custom license plates involve, at minimum, some private speech," and that "it would not have been reasonable for defendants to conclude [the government speech] doctrine permitted viewpoint discrimination in this case." *Martinez*, 2006 WL 544502, at *1.

Second, numerous cases involving "Choose Life" license plates are currently pending in federal courts throughout the country. Their sheer number is an indication of the importance of the question at hand. And, as the conflict between the Sixth and Fourth Circuits already demonstrates, these cases are unlikely to reach uniform results absent clear guidance from this Court. *See* Sup. Ct. R. 10(c).

Third, courts of appeals have expressed confusion about the proper scope and application of the government speech doctrine. The Sixth Circuit's misreading of *Johanns* exemplifies this confusion. The varying rulings in the lower courts on this issue demonstrate the need for a clear decision from the Court. *See* Sup. Ct. R. 10(c).

Finally, the Sixth Circuit's reasoning conflicts with relevant free speech decisions from this Court that should have governed the outcome of the case. In contrast to the Sixth Circuit, this Court recognized in *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977), that even standard-issue license plates that are not selected by individual drivers – unlike the "Choose Life" license plates at issue in this case – implicate private speech rights. Additionally, by assessing the "Choose Life" license plates in a vacuum without considering the overall specialty license plate program, the Sixth Circuit's reasoning is also inconsistent with *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). And, by upholding the state's right to engage in viewpoint discrimination, the Sixth Circuit's decision is irreconcilable with this Court's repeated holding that the government may not discriminate among private speakers based on viewpoint, no matter what the forum. *See, e.g., Rosenberger v.*

Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). The conflict between the Sixth Circuit's reasoning and this Court's free speech jurisprudence is yet another reason to grant the petition. *See* Sup. Ct. R. 10(c).

I. The Sixth Circuit's Decision Directly Conflicts With a Decision of the Fourth Circuit.

The Sixth Circuit's decision is in direct conflict with the Fourth Circuit's decision in *PPSC*, 361 F.3d 786. In *PPSC* – a case virtually identical to this one – the Fourth Circuit rejected the conclusion that specialty license plates constitute pure government speech. *See id.* at 792-93 (Michael, J.); *id.* at 800 (Luttig, J., concurring in the judgment); *id.* at 801 (Gregory, J., concurring in the judgment).[8] As Judge Michael explained,

> Although a specialty license plate, like a standard plate, is state-owned and bears a

[8] The Eleventh Circuit, addressing a challenge to Florida's "Choose Life" plates, likewise rejected the argument that the plates constitute pure government speech. *See Women's Emergency Network v Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003). Although that court held that the plaintiffs lacked standing to challenge the plates, it concluded: "We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech." *Id*

> state-authorized message, the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty license plate imprinted with the phrase "Choose Life" would doubt that the owner of that vehicle holds a pro-life viewpoint. The literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner, not the State, just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker.

Id. at 794 (Michael, J.). The Fourth Circuit then held that South Carolina's "Choose Life" plates violate the First Amendment because they discriminate on the basis of viewpoint. *Id.* at 799 (Michael, J.); *id.* at 800 (Luttig, J., concurring in the judgment); *id.* at 801 (Gregory, J., concurring in the judgment).

In the instant case, by contrast, the Sixth Circuit concluded that Tennessee's "Choose Life" license plate is a "government-crafted message" and therefore not subject to the rule against viewpoint discrimination. Pet. App. A10. The Sixth Circuit expressly rejected the Fourth Circuit's reasoning as unpersuasive, claiming that "the Fourth Circuit opinions in [*PPSC*] are in tension with the intervening case of *Johanns*." Pet. App. A21. The Sixth Circuit's decision is thus squarely at odds with a decision

of the Fourth Circuit on an important First Amendment question.[9]

II. The Sheer Number of Challenges to the Issuance or Rejection of "Choose Life" Plates Across the Country Confirms That Petitioners Raise an Important Question of Federal Law That Has Not Been, But Should Be, Squarely Decided by the Court.

The sheer number of "Choose Life" cases across the country confirms that these cases present an important First Amendment question in need of a unifying response from the Court. In addition to the challenges to the South Carolina "Choose Life" plate, *see PPSC*, 361 F.3d 786; the Louisiana "Choose Life" plate and specialty license plate scheme, *see Henderson*, 407 F.3d 351; and New York's rejection of a "Choose Life" plate, *see Martinez*, 2006 WL 544502, courts are currently considering challenges to Oklahoma's "Choose Life" plate, *see Hill v.*

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[9] The Sixth Circuit's decision also divides the courts of appeals on another important question. The Fifth Circuit has held that the Tax Injunction Act deprives it of subject matter jurisdiction over challenges to the constitutionality of Louisiana's "Choose Life" plate and specialty license plate scheme. *See Henderson v. Stalder*, 407 F.3d 351, 354-60 (5th Cir. 2005), *petition for cert. filed sub nom. Keeler v. Stalder*, No. 05-1222 (Mar. 21, 2006). The Sixth Circuit expressly rejected that conclusion below. Pet. App. A5-A10; Pet. App. A22 (Martin, J., concurring in part and dissenting in part). Petitioners agree with the Sixth Circuit's ruling on the Tax Injunction Act question and do not appeal from it. Should this Court grant the petition for certiorari that has been filed in *Keeler*, however, Petitioners request that this case – which raises both the constitutional claim and the Tax Injunction Act question – be considered with it.

Kemp, No. 04-CV-0028-CVE-PJC (N.D. Okla. Aug. 16, 2005), *appeal docketed*, No. 05-5160 (10th Cir. Sept. 15, 2005); Arizona's refusal to issue a "Choose Life" plate, *see Arizona Life Coalition, Inc. v. Stanton*, No. CV-03-1691-PHX-PGR, 2005 WL 2412811 (D. Ariz. Sept. 26, 2005), *appeal docketed*, No. 05-16971 (9th Cir. Oct. 18, 2005); Ohio's "Choose Life" plate, *see NARAL Pro-Choice Ohio v. Taft*, No. 1:05 CV 1064, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005), *appeal docketed*, No. 05-4338 (6th Cir. Oct. 28, 2005); New Jersey's refusal to issue a "Choose Life" plate, *see Children First Foundation, Inc. v. Legreide*, No. Civ A. 04-2137(MLC), 2005 WL 3088334 (D.N.J. Nov. 17, 2005) (denying motion to abstain and to certify case for interlocutory appeal); and Illinois's refusal to issue a "Choose Life" plate, *see Choose Life Illinois, Inc. v. White*, No. 1:04-cv-04316 (N.D. Ill. filed June 28, 2004) (cross-motions for summary judgment pending).[10] Petitioners respectfully submit that the Court should grant the writ to provide the proper framework for resolution of these cases.

III. The Court Should Clarify the Proper Scope and Application of the Government Speech Doctrine to Alleviate Confusion Among Lower Courts.

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[10] In addition to these currently pending cases, final decisions have been issued in a challenge to Florida's issuance of a "Choose Life" plate, *see Women's Emergency Network*, 323 F.3d 937, and California's refusal to issue a "Choose Life" plate, *see Women's Resource Network v. Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004).

The Court should also grant the writ to provide the lower courts with needed clarification on the proper scope and application of the government speech doctrine. The confusion among lower courts is evident by the split in the courts of appeals in the "Choose Life" license plate cases. *See supra* at 13-14. More than just diametrically opposed decisions, the split involves an array of legal analyses. As the dissent in this case recognized, "[w]hen this opinion is filed, at least three circuits (4th, 5th, and 6th) will have spoken on the issue, reaching at least three different conclusions, via at least sixteen separate opinions." Pet. App. A22 n.1 (Martin, J., concurring in part and dissenting in part).

The lower courts' confusion is well illustrated by the Fourth Circuit's overall treatment of specialty license plate cases. Although the court in *PPSC* held – in three separate opinions – that the "Choose Life" license plates were a hybrid of government and private speech, *see* 361 F.3d 786, the same court held in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles* (*SCV*) that specialty license plates were purely private speech. 288 F.3d 610 (4th Cir. 2002), *reh'g en banc denied*, 305 F.3d 241 (4th Cir. 2002). As the *SCV* court noted, "[n]o clear standard has yet been enunciated . . . by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions . . . . [T]here exists some controversy over the scope of the government speech doctrine." *Id.* at 618; *see also* 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc) (stating that the "underdevelopment" of the government speech doctrine is a source of "confusion"); *id.* at 248 (Niemeyer, J., dissenting from the denial of rehearing en

banc) ("Whether license-plate content is government speech has never been decided by our court, and the appropriate analysis is not clearly indicated by any Supreme Court precedent."); *id.* at 251 (Gregory, J., dissenting from the denial of rehearing en banc) ("What is, and what is not, 'government speech' is a nebulous concept, to say the least."). Moreover, as Judge Luttig of the Fourth Circuit has noted, this Court has not yet explicitly addressed the theory that speech can be a "hybrid" of both government and private speech. *See, e.g.*, *PPSC*, 361 F.3d at 800 (Luttig, J., concurring in the judgment) (stating that the Supreme Court has not yet "recognized that a single communicative event may be both private speech and governmental speech").

Other courts and scholars have expressed similar confusion over the government speech doctrine. For example, the Tenth Circuit, in considering whether a city could constitutionally exclude the plaintiffs' message from its holiday display, stated: "The Supreme Court has provided very little guidance as to what constitutes government speech." *Wells v. City and County of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001); *see also Johanns*, 125 S. Ct. at 2070 (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1510 (2001) (recognizing "theoretical confusion" in the government speech doctrine).

As the instant case demonstrates, the Court's decision in *Johanns* does not resolve the matter. The majority below erroneously believed that the analysis set

forth in *Johanns* compelled the conclusion that the specialty license plate messages are government speech. *See, e.g.*, Pet. App. A11. In fact, there are important distinctions between that case and this one. For example, in *Johanns*, the connection between the message at issue and the plaintiffs – who included private beef producers – was too attenuated for third parties to identify the message with the plaintiffs. This Court was quite clear that "[i]f a viewer would identify the speech as [the plaintiffs'], . . . the analysis would be different." *Johanns*, 125 S. Ct. at 2064 n.7. Here, by contrast, specialty license plates are readily associated with car owners, who select, pay extra for, and display specialty license plates on their private vehicles. And it strains credulity to claim that the messages on the plates – messages that include, for example, "University of Florida" (the University of Tennessee's arch-rival in football), *see* TENN. CODE ANN. § 55-4-250; "street rod" (available to owners of cars made before 1949, if they furnish proof that the car is registered in a Tennessee street rod club, *see id.* § 55-4-230(a)); and "Fellowship of Christian Athletes," *see id.* § 55-4-234 – are identified with the state rather than the individual car owners. As Judge Martin noted below,

> Many of the messages [on Tennessee's specialty license plates] are not germane to governance (for example, the plates promoting antiques, numerous out-of-state universities, Ducks Unlimited, and various others). The Fellowship of Christian Athletes may beg other First Amendment questions if it is *promoted* by the government. I would also question

> whether Tennessee wishes to promote the Sons of Confederate Veterans plate, bearing the Confederate Flag as its design. I find it telling that in this appeal, the state did not claim to be "promoting" these messages.

Pet. App. A30 n.8 (Martin, J., concurring in part and dissenting in part).

Additional factors confirm that the majority below misapplied *Johanns*. For example, the Act requires at least 1000 people to pre-purchase a "Choose Life" license plate before the State will produce it.[11] "'If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its 'speech' is triggered.'" Pet. App. A29 n.7 (Martin, J., concurring in part and dissenting in part) (quoting *SCV*, 288 F.3d at 620). And the specialty license plate application confirms the private nature of the message. Pet. App. A28 (Martin J., concurring in part and dissenting in part) (noting that the application states, "SHOW YOUR SCHOOL SPIRIT" and "SUPPORT YOUR CAUSE AND COMMUNITY"); *see supra* at 5. At a minimum, these distinctions highlight the need for this Court to provide additional guidance regarding the meaning of

[11] As the dissent in this case recognized, "Tennessee does not expend any funds of its own. The entire license plate is funded by the private purchasers." Pet. App. A29 n.7 (Martin, J., concurring in part and dissenting in part).

Johanns specifically and the contours of the government speech doctrine more generally.[12]

Finally, granting the writ would provide this Court an opportunity to clarify whether viewpoint discrimination is automatically permitted upon a determination that government speech is involved. Judges in both the Sixth and Fourth Circuits have divided over this question, with some concluding that in contexts like specialty license plates, even assuming *arguendo* that government speech is involved, viewpoint discrimination may violate the First Amendment. *See, e.g.*, Pet. App. A33 (Martin, J., concurring in part and dissenting in part) ("[W]hether the particular Choose Life message is the government's own or private speech, the First Amendment harm is not alleviated for the persons denied access."); *SCV*, 305 F.3d at 251 n.1 (Gregory, J., dissenting from denial of rehearing en banc) (disagreeing with "the panel's implication . . . that the government can always engage in viewpoint discrimination when it is the speaker. It may be that 'the values underlying viewpoint neutrality should in some circumstances limit the government's ability to skew the debate and suppress disfavored ideas or information.'" (quoting Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 159 (1996))); *see also PPSC*, 361 F.3d at 795 (Michael, J., concurring) (recognizing that even when the government is potentially the speaker in a forum for

[12] Commentators have likewise noted that *Johanns* did not definitively delineate the parameters of the government speech doctrine. *See Government Speech Doctrine – Compelled Support for Agricultural Advertising*, 119 HARV. L. REV. 277, 283 (2005); Ian Heath Gershengorn, *Lingering Uncertainty*, 27 NAT'L L.J. 48 (2005).

speech, it may not give its "own viewpoint privilege above others").

IV. The Sixth Circuit's Reasoning in This Case Conflicts With the Court's Well-Established Precedent.

Although the Court has not squarely decided the question in this case, the Sixth Circuit's reasoning is at odds with relevant Court precedent that should have governed its outcome. First, the Sixth Circuit's reasoning conflicts with *Wooley*, 430 U.S. 705. In *Wooley*, the Court held that the State of New Hampshire could not require private individuals to display the state motto "Live Free or Die" on their license plates. *Id.* at 717. The *Wooley* Court recognized that even standard-issue license plates, which are in no way selected by individual motorists, nonetheless implicate private speech rights. *Id.* at 717 n.15; *see also SCV*, 305 F.3d at 244 (Williams, J., concurring in denial of rehearing en bánc) (if license plates were pure government speech, "then the First Amendment claim in *Wooley* ought to have foundered for failure to implicate individual speech rights"). If standard state-issued plates implicate private speech, the association between the vehicle owner and the license plate is even stronger in the case of specialty license plates because private individuals affirmatively select and pay extra for these plates. *See PPSC*, 361 F.3d at 794. There is no speech at issue until private individuals select the message, pay an additional fee for it, and display it on their privately owned cars. *See supra* at 3-4, 6. Thus, under *Wooley*, specialty license plates implicate – at minimum – *some* private speech rights.

Second, the reasoning below is inconsistent with *Velazquez*, 531 U.S. 533. In that case, the Court held that restrictions on attorneys employed by government-funded legal services programs implicated private, not government, speech. In reaching its conclusion, the Court looked to the overall purpose of the legal services program: "[T]he LSC program was designed to facilitate private speech, not to promote a governmental message." *Id.* at 542. Here, the majority disregarded entirely the overall purpose of the specialty license plate scheme, contributing to its incorrect determination that the "Choose Life" license plate is purely government speech. *See* Pet. App. A41 (Martin, J., concurring in part and dissenting in part) (noting that the majority fails to consider the "license plate program as a whole"). When the overall purpose of the specialty license plate program is considered, *see supra* at 3-7, it is evident that the "'program was designed to facilitate private speech.'" Pet. App. A25 (Martin, J., concurring in part and dissenting in part) (quoting *Velazquez*, 531 U.S. at 452).

Third, the Court's precedent is likewise clear that once private speech rights are implicated, regardless of the type of forum at issue – the traditional public forum, the designated or limited public forum, or the nonpublic forum – the government may not discriminate based on viewpoint. *See, e.g., Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806; *Perry Educ. Ass'n*, 460 U.S. at 45-46; *Police Dep't of Chicago*, 408 U.S. at 96. The government may not limit speech based on "the specific motivating ideology or the opinion or perspective of the speaker," nor may it "favor one speaker over another." *Rosenberger*, 515 U.S. at 828-29. But that is precisely what the State in this case has done: It enacted legislation

creating a "Choose Life" license plate, while twice rejecting legislation that would create a "pro-choice" plate. *See supra* at 3-4. By nonetheless upholding the Act, the Sixth Circuit acted contrary to this Court's free speech rulings. This Court should grant the writ to correct that error.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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April 28, 2006

APPENDIX

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United States Court of Appeals for the Sixth Circuit

AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE; Planned Parenthood of Middle and East Tennessee, Inc.; Sally Levine; Hilary Chiz; Joe Sweat, Plaintiffs-Appellees,

v.

Philip BREDESEN, Governor of Tennessee; Fred Phillips, Commissioner of Safety of Tennessee, Defendants-Appellees,

Friends of Great Smoky Mountains National Park, Inc., a non-profit North Carolina Corporation, Defendant,

New Life Resources, Inc., Intervening Defendant-Appellant.

No. 04-6393.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 03-01046
Todd J. Campbell, District Court Judge

Argued: Nov. 2, 2005
Decided and Filed: March 17, 2006

Before: MARTIN, NELSON, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: James Bopp, Jr., Bopp, Coleson & Bostrom, Terre Haute, Indiana, for Appellant. Julie E. Sternberg, American Civil Liberties Union Foundation, New York,

New York, Jimmy G. Creecy, Office of the Attorney General, Nashville, Tennessee, for Appellees. **ON BRIEF:** James Bopp, Jr., Thomas J. Marzen, Anita Y. Woudenberg, Bopp, Coleson & Bostrom, Terre Haute, Indiana, for Appellant. Julie E. Sternberg, Carrie Y. Flaxman, Caroline M. Corbin, American Civil Liberties Union Foundation, New York, New York, Jimmy G. Creecy, Office of the Attorney General, Nashville, Tennessee, Melody L. Fowler-Green, ACLU Foundation of Tennessee, Nashville, Tennessee, Susan L. Kay, Vanderbilt School of Law, Nashville, Tennessee, Roger K. Evans, Donna Lee, Planned Parenthood Federation of America, New York, New York, for Appellees. Mathew D. Staver, Liberty Counsel, Maitland, Florida, Mary E. McAlister, Liberty Counsel, Lynchburg, Virginia, for Amicus Curiae.

ROGERS, J., delivered the opinion of the court, in which NELSON, J., joined.
MARTIN, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION

ROGERS, Circuit Judge.

In this case we are required to decide the constitutionality of Tennessee's statute making available the purchase of automobile license plates with a "Choose Life" inscription, but not making available the purchase of automobile license plates with a "pro-choice" or pro-abortion rights message. *See* TENN. CODE ANN. § 55-4-306. Although this exercise of government one-sidedness with respect to a very contentious political issue may be

ill-advised, we are unable to conclude that the Tennessee statute contravenes the First Amendment. Government can express public policy views by enlisting private volunteers to disseminate its message, and there is no principle under which the First Amendment can be read to prohibit government from doing so because the views are particularly controversial or politically divisive. We accordingly reverse the judgment of the district court invalidating the statute on First Amendment grounds.

I.

Tennessee statutory law authorizes the sale of premium-priced license plates bearing special logotypes to raise revenue for specific "departments, agencies, charities, programs and other activities impacting Tennessee." TENN. CODE ANN. § 55-4-201(j). The statute authorizing issuance of these license plates earmarks half of their respective profits for named non-profit groups committed to advancing the causes publicized on the plates. *Id.* § 55-4-215 to -217.

The State of Tennessee takes the other half of the profits. *See id.* § 55-4-215(a)(2)-(3). Forty percent (of the total profits) goes to the Tennessee arts commission, while the remaining 10 percent goes to the state's highway fund. *Id.* Tennessee will not issue a new specialty license plate until customers place at least one thousand advance orders. *See id.* § 55-4-201(h)(1).

The Tennessee legislature has determined the price of specialty plates by statute. In general, they cost the same as a non-specialty plate plus a $35.00 fee (if the government issues the plate on or after September 1,

2002, as in this case). *See id.* § 55-4-203(d).

In 2003, the Tennessee legislature passed a law (hereinafter "the Act") authorizing issuance of a specialty license plate with a "Choose Life" logotype "designed in consultation with a representative of New Life Resources." *See id.* § 55-4-306(b). Half of the profits go to New Life Resources, Inc. (New Life). *See id.* § 55-4-306(c)-(d). New Life's half "shall be used exclusively for counseling and financial assistance, including food, clothing, and medical assistance for pregnant women in Tennessee." *Id.* § 55-4-306(c). The Act strictly regulates the precise activities that these profits shall fund. *See id.* § 55-4-306(d). It also provides a comprehensive list of dozens of groups that must share in a portion of these profits. *See id.* It is undisputed that during legislative consideration of the Act, Planned Parenthood of Middle and East Tennessee "lobbied for an amendment authorizing a 'Pro-Choice' specialty license plate . . . , but the measure was defeated." JA 231.

The plaintiffs in this action, the American Civil Liberties Union of Tennessee and others, filed a civil action in federal district court challenging the Act as facially unconstitutional, naming the Governor of Tennessee as defendant. New Life intervened as a defendant. The district court granted summary judgment to the plaintiffs, enjoining enforcement of the Act. The district court held that the authorization of the "Choose Life" license plate was not purely government speech. Relying largely upon Fourth Circuit precedent, the district court held that "both the State and the individual vehicle owner are speaking" – a "mixture" of government and private speech. JA 33-34 (citing *Planned Parenthood of*

S.C., Inc. v. Rose, 361 F.3d 786, 793-94 (4th Cir. 2004); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 615 (4th Cir. 2002)). Reasoning that providing for such "mixed" speech is not constitutional if doing so is discriminatory as to viewpoint, the district court found that the statute was clearly discriminatory as to viewpoint and enjoined enforcement of the Act. The district court expressly refrained, however, from reaching the question of whether the entire specialty license plate program was unconstitutional.

New Life appeals. Although the Tennessee state defendants have not appealed, they have filed a brief urging this court not to strike down Tennessee's specialty license plate scheme in its entirety.

II.

First, the district court was not deprived of subject matter jurisdiction in this case by the Tax Injunction Act (TIA), 28 U.S.C. § 1341, as argued by New Life. New Life claims that the extra cost for a "Choose Life" specialty license plate constitutes a tax that may not, under the TIA, be enjoined by a federal district court if a plain, speedy and efficient remedy may be had in Tennessee courts. Even making the somewhat artificial assumption that it is really the payments that are being challenged in this case,[1] the payments are most closely

[1] *Compare Hibbs v. Winn*, 542 U.S. 88 (2004). In *Hibbs*, the Supreme Court held that the TIA did not bar an Establishment Clause challenge to a state income-tax credit for payments to certain organizations that give tuition grants to students attending religious schools. The Court explained that "in enacting the TIA, Congress

analogous to payments for simple purchases from the government. Ordinary purchase payments are not taxes under the TIA, and neither is the extra payment for a specialty license plate. It follows that the TIA did not deprive the district court of subject matter jurisdiction in this case.

This conclusion is supported by the longstanding distinction drawn in various legal contexts between taxes and ordinary debts. The Supreme Court for instance explained in *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906):

> Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government. We think this exaction is of that character. It is required to be paid by the corporation after organization in invitum.[2] The amount is fixed by the statute, to be paid on the outstanding capital stock of the

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trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Hibbs*, 542 U.S. at 104-05. The Court also noted that cases applying the TIA generally "involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes)." *Id.* at 106. Plaintiffs in this case are of course not seeking to avoid paying for a "Choose Life" license plate, and it is therefore at least questionable whether the TIA would apply even if the payment for the license plates were a "tax." We need not reach the issue, however, because of our determination that no tax is involved here.

[2] "In invitum" means "[a]gainst an unwilling person." BLACK'S LAW DICTIONARY 787 (7th ed. 1999).

corporation each year, and capable of being enforced by action against the will of the taxpayer. As was said by Mr. Justice Field, speaking for the court in *Meriwether v. Garrett*, 102 U.S. 472, 513:

> "Taxes are not debts . . . . Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character."

See also Fla. Cent. & Peninsular R.R. Co. v. Reynolds, 183 U.S. 471, 475 (1902) ("tax" defined as "enforced" contribution and distinguished from ordinary contractual debt); *Patton v. Brady*, 184 U.S. 608, 619 (1902) (same); *Alaska Consol. Canneries v. Territory of Alaska*, 16 F.2d 256, 257 (9th Cir. 1926) (same).

The Fifth Circuit has relied upon the definition of tax in *Anderson* to hold that a challenge to the collection of lease rent payments was not subject to the Tax Injunction Act. The Fifth Circuit explained,

> The State contends that the leases are in fact taxes, and thus the federal courts are barred by the Tax

> Injunction Act, 28 U.S.C. § 1341, from entertaining a challenge to the State's actions to collect on the leases. This contention is without merit. The lease obligations are a creature of contract, not a mandatory obligation imposed by the state as taxes are.

Lipscomb v. Columbus Mun. Separate Sch. Dist., 269 F.3d 494, 500 n.13 (5th Cir. 2001). The analysis would apply a fortiori to ordinary purchases, like the purchase of government bonds, or the purchase of a souvenir at a state park gift store. Such purchase payments can hardly be termed "taxes" as opposed to ordinary payments on voluntary contracts. This conclusion follows, moreover, regardless of what the government does with the sales income.

In this case, Tennessee's sale of specialty plates creates contractual debts to pay but imposes no tax. Instead of using its sovereign power to coerce sales, Tennessee induces willing purchases as would any ordinary market participant. The government confers all the same driving privileges on people who forgo specialty plates to buy standard-issue plates. Drivers' only motive for buying such plates, therefore, must rest with the attractiveness of the "Choose Life" message as Tennessee has marketed it, not a desire to obey Tennessee's will. Under *Anderson* and *Lipscomb*, these sales constitute regular contractual payments, not taxes.

We recognize that there is some case law to the effect that cases like this one are precluded by the Tax Injunction Act. *See Henderson v. Stalder*, 407 F.3d 351, 354-60 (5th Cir. 2005); *NARAL Pro-Choice Ohio v. Taft*,

No. 1:05 CV 1064, 2005 U.S. Dist. LEXIS 21394, at *16-*26 (N.D. Ohio Sept. 27, 2005). These cases proceed on the questionable assumption that the applicable test is the one for differentiating between a regulatory fee and a tax. *See generally Hedgepeth v. Tenn.*, 215 F.3d 608 (6th Cir. 2000). This test was created to answer a different question: whether a regulatory fee, often directed to a segregated fund for a special use related to the basis for imposing the fee, is or is not a tax for TIA purposes. *See generally San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683 (1st Cir. 1992). The classic non-tax regulatory fee

> is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id. at 685 (citations omitted) (Breyer, J.). In contrast, a purchase price cannot be said to be "imposed by an agency upon those subject to its regulation." Instead it is merely a contract price. The test for determining which compelled exactions are taxes and which are fees cannot logically be used to determine whether a payment is a compelled exaction in the first place. Under the Supreme Court's basic definition of a tax, logically applied in *Lipscomb*, the TIA does not preclude federal jurisdiction over the plaintiffs' claims in this case.

Eight judges of the Fifth Circuit accordingly

dissented from the denial of rehearing en banc in *Henderson v. Stalder*, 434 F.3d 352 (5th Cir. 2005) (Davis, J. dissenting). In an opinion with which we are in substantial agreement, the dissent acknowledged the accepted test for distinguishing between a regulatory fee and a tax, but explained that "this does not mean that the extra charge for a specialty plate must be one or the other." *Id.* at 355. It does not follow, in other words, that if "the charge is not a regulatory fee . . . it must be a tax." *Id.* Relying in part on the Ninth Circuit's reasoning in *Bidart Brothers v. Calif. Apple Comm'n*, 73 F.3d 925 (9th Cir. 1996), the Fifth Circuit dissent reasoned that, "the relevant question is whether this charge is a tax and if the answer to this question is no, the TIA does not apply regardless of whether the charge is characterized as a regulatory fee, a charitable donation or something else." *Henderson*, 434 F.3d at 355. Thus even though the Fifth Circuit dissent found the charge for the Louisiana "Choose Life" plate not to be a regulatory fee, the charge was not a tax either, in part because "the charge is not 'imposed' by the legislature; because it is entirely optional and voluntary on the part of Louisiana citizens electing to pay the extra charge for a specialty plate." *Id.* at 356.

III.

On the merits we are faced with a purely legal issue: whether a government-crafted message disseminated by private volunteers creates a "forum" for speech that must be viewpoint neutral. No such requirement applies, at least with respect to state-produced specialty license plates like those at issue in this case.

A. *The "Choose Life" Specialty License Plate Bears a Government-Crafted Message*

"Choose Life," as it is to appear on the face of Tennessee specialty license plates, is a government-crafted message. *See Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055 (2005). *Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes. *See id.* at 2062-66. In this case, *Johanns* requires the court to conclude that "Choose Life" is Tennessee's message because the Act determines the overarching message and Tennessee approves every word on such plates.

In *Johanns*, the Supreme Court held that federal government promotional campaigns to encourage beef consumption constituted government speech because the "message of the promotional campaigns is effectively controlled by the Federal Government itself." *Id.* at 2062. In these campaigns, however, the federal government did not explicitly credit itself as the speaker. *See id.* at 2059 (messages bore the attribution, "Funded by America's Beef Producers").

More specifically, the "message set out in the beef promotions" counted as government speech because "from beginning to end [it is] the message established by the Federal Government." *Id.* at 2062. Congress "directed the implementation of a coordinated program of promotion" that includes paid advertising to advance the

"image and desirability of beef and beef products." *Id.* at 2062-63 (internal quotation marks omitted). Congress and the U.S. Secretary of Agriculture enunciated "the overarching message and some of its elements," while leaving the "remaining details to an entity whose members are answerable to the Secretary." *Id.* at 2063. Also, the "Secretary exercises final approval authority over every word used in every promotional campaign." *Id.* The Supreme Court concluded that when "the government sets the overall message to be communicated and approves every word that is disseminated," it is government speech. *Id.*

Johanns supports classifying "Choose Life" on specialty license plates as the State's own message. The Tennessee legislature chose the "Choose Life" plate's overarching message and approved every word to be disseminated. Tennessee set the overall message and the specific message when it spelled out in the statute that these plates would bear the words "Choose Life." TENN. CODE ANN. § 55-4-306. Tennessee, like the Secretary of Agriculture in *Johanns*, leaves some of the "remaining details to an entity whose members are answerable" to the State government. Tennessee delegates partial responsibility for the design of the plate to New Life, but retains a veto over its design. *See id.* § 55-4-306(b). The "Choose Life" plate must be issued in a design configuration distinctive to its category and determined by the commissioner. *Id.* § 55-4-202(b)(2). Thus, Tennessee's statutory law, and its power to withdraw authorization for any license plate, gives the State the right to wield "final approval authority over every word used" on the "Choose Life" plate. As in *Johanns*, here Tennessee "sets the overall message to be communicated

and approves every word that is disseminated" on the "Choose Life" plate. It is Tennessee's own message.

Plaintiffs argue that "Choose Life" on specialty plates should be treated not as Tennessee's own message but as "mixed" speech subject to a viewpoint-neutrality requirement. Plaintiffs point to the following undisputed facts to support their view: (1) Tennessee produces over one hundred specialty plates in support of diverse groups, ideologies, activities, and colleges; (2) a private anti-abortion group, New Life, collaborates with the State to produce the "Choose Life" plate; and (3) vehicles are associated with their owners, creating the impression that a "Choose Life" license plate attached to a vehicle represents the vehicle owner's viewpoint. These facts are however consistent with the determination that "Choose Life" on a Tennessee specialty plate is a government-crafted message.

First, there is nothing implausible about the notion that Tennessee would use its license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges. Government in this age is large and involved in practically every aspect of life. At least where Tennessee does not blatantly contradict itself in the messages it sends by approving such plates, there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval. It is noteworthy that Tennessee has produced plates for respectable institutions such as Penn State University but has issued no plates for groups of wide disrepute such as the Ku Klux Klan or the American Nazi Party. Plaintiffs' position implies that Tennessee must provide specialty plates for these hate groups in order for

it constitutionally to provide specialty plates supporting any institution. Such an argument falls of its own weight.

Second, as *Johanns* makes clear, the participation of New Life in designing the "Choose Life" logotype has little or no relevance to whether a plate expresses a government message. *See* 125 S. Ct. at 2062-63. In *Johanns* the Supreme Court upheld the beef marketing scheme as government speech even though the development of details was left to an entity "answerable" to the Secretary of Agriculture. *Id.* So long as Tennessee sets the overall message and approves its details, the message must be attributed to Tennessee for First Amendment purposes. *See id.*

Third, *Johanns* also says that a government-crafted message is government speech even if the government does not explicitly credit itself as the speaker. Many of the promotional messages in *Johanns* bore the attribution "Funded by America's Beef Producers." *Id.* at 2059. The Supreme Court explained that the tagline, "standing alone, is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad." *Id.* at 2065-66. This was true even though the message was presumably conveyed in private media containing mostly privately-sponsored advertising. In contrast, the medium in this case, a government-issued license plate that every reasonable person knows to be government-issued, a fortiori conveys a government message.

B. Dissemination of a Government-Crafted Message by Private Volunteers Does Not

Create a "Forum" for Speech Requiring Viewpoint Neutrality

Plaintiffs' most intuitively inviting argument—that the government must be viewpoint neutral when it relies on like-minded volunteers to disseminate its message—cannot in the end invalidate the Act. Plaintiffs point to the following facts to support this aspect of their argument: (a) the government must receive one thousand advance customer orders for the "Choose Life" plate or Tennessee will not manufacture it; (b) the "Choose Life" message is communicated by private citizens' affirmatively purchasing the plates and attaching them to their privately-owned vehicles; (c) the Tennessee government devotes no funds to disseminating the "Choose Life" message, but rather raises money by selling these plates to customers who wish to have "Choose Life" plates on their cars. While it is true that such voluntary dissemination itself qualifies as expressive conduct, the government's reliance on private volunteers to express its policies does not create a "forum" for speech requiring viewpoint neutrality.

This conclusion is supported by negative inference from the one Supreme Court case dealing with license plate speech. In *Wooley v. Maynard*, 430 U.S. 705 (1977), New Hampshire embossed its state motto, "Live Free or Die," on standard-issue license plates in the same way that Tennessee would stamp "Choose Life" on specialty plates. *See id.* at 707. The *Wooley* Court characterized "Live Free or Die" as "the State's ideological message," *id.* at 715, and the State's "official view," *id.* at 717. The Supreme Court held that New Hampshire could not constitutionally prosecute vehicle

owners for covering up the motto on their license plates, because by doing so the State would be unconstitutionally forcing automobile owners to adhere to an ideological point of view they disagreed with. Nowhere did the Court suggest that the State's message could not be so disseminated by those who did not object to the State's motto, or even hint that the State could not put the message on state-issued license plates. "Choose Life" is Tennessee's public message, just as "Live Free or Die" communicated New Hampshire's individualist values and state pride. The evil in *Wooley* was that the automobile owners were compelled to disseminate the message; here automobile owners are not only not compelled, they have to pay extra to disseminate the message.

In general, the government does not create a "forum" for expression when it seeks to have private entities disseminate its message. In *Johanns*, for instance, the federal government paid for the "Beef. It's What's for Dinner" message and other promotional messages. 125 S. Ct. at 2059. Although these involved "print and television messages," *id.* at 2059, presumably published or broadcasted by hired private entities, the Court classified this and the rest of the beef promotions as government speech for First Amendment purposes. *See id.* at 2058, 2062-66. Likewise, in *Rust v. Sullivan*, the federal government allocated Title X funds to doctors for family planning counseling but forbade such doctors from discussing abortion with the program's patients. 500 U.S. 173, 178-83 (1991). In *Rust*, the Court recognized that when "the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) (interpreting *Rust*). If in this case Tennessee drivers were *paid* by the government to display "Choose Life" plates, the Act would unquestionably be constitutional.

In this case, however, the carriers of Tennessee's message are unpaid. They are volunteers. Rather then receiving government money, they pay out of their own pockets for the privilege of putting the government-crafted message on their private property. Plaintiffs argue that this fact demonstrates that "Choose Life" is not purely the government's message but also the speech of the customers who purchase and display these plates—thus creating a "forum" for speech. While it is true that volunteers' display of "Choose Life" plates expresses agreement with Tennessee, that fact does not mean that a First Amendment "forum" for speech has been created.

The doctors in *Rust* disagreed with the government's anti-abortion policy. But if they had been true believers in the policy and had volunteered to work in the program free of charge, the speech restrictions in *Rust* would still have expressed the government's anti-abortion viewpoint—and therefore qualified for government speech treatment. Similarly, the publications and television stations in *Johanns* that published or broadcasted beef advertisements would have conveyed a government-crafted message even if they had done so for free. There is nothing in the Supreme Court's decisions in *Rust* or *Johanns* that implies that the government has less right to control expressions of its policies when it relies on unpaid private people. No constitutionally significant distinction exists between volunteer

disseminators and paid disseminators.

Plaintiffs' view that volunteer dissemination of a government-crafted message creates a "forum," if accepted, would force the government to produce messages that fight against its policies, or render unconstitutional a large swath of government actions that nearly everyone would consider desirable and legitimate. Government can certainly speak out on public issues supported by a broad consensus, even though individuals have a First Amendment right not to express agreement. For instance, government can distribute pins that say "Register and Vote," issue postage stamps during World War II that say "Win the War,"[3] and sell license plates that say "Spay or Neuter your Pets."[4] Citizens clearly have the First Amendment right to oppose such widely-accepted views, but that right cannot conceivably require the government to distribute "Don't Vote" pins, to issue postage stamps in 1942 that say "Stop the War," or to sell

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[3] *See* Scott Catalogue No. 905 (1942). The example is hardly unusual, as United States postage stamps have carried a variety of government-crafted advocacy messages over the years. Examples include "Give Me Liberty or Give Me Death" (Scott No. 1144 (1961)), "Register and Vote" (Scott No. 1394 (1968)), "Giving Blood Saves Lives" (Scott No. 1425 (1971)), "Organ and Tissue Donation: Share Your Life . . ." (Scott No. 3227 (1998)), and "Breast Cancer, Fund the Fight, Find a Cure" (Scott No. B1 (1998)). *See also* Scott No. 1129 ("World Peace Through World Trade"), No. 1142 ("And this be our Motto, in God is our Trust"), No. 1320 ("We appreciate our Servicemen"), No. 1343 ("Law and Order"), No. 1438 ("Prevent Drug Abuse"), No. 1455 ("Family Planning"), No. 1802 ("Honoring Vietnam Veterans"), No. 1831 ("Organized Labor Proud and Free"), No.1927 ("Alcoholism You Can Beat It!"), No. 2102 ("Take a Bite out of Crime").

[4] *See* KY. REV. STAT. ANN. § 186.162(2)(y) (2005).

license plates that say "Spaying or Neutering your Pet is Cruel."

We cannot affirm the district court in this case without either (1) effectively invalidating all such hitherto-accepted forms of privately disseminated government speech, or (2) distinguishing these examples from the "Choose Life" specialty license plates.

Neither the district court nor the plaintiffs on appeal attempt to articulate a basis for distinguishing these examples. Government-printed pamphlets or pins saying "Register and Vote" or "Buy U.S. Bonds" are clearly government-crafted messages distributed by private individuals who have a First Amendment right not to disseminate them if they don't want to. Postage stamps saying "Win the War" or "Support Our Troops" are clearly government-crafted messages disseminated by private individuals who, under *Wooley*, also presumably have a First Amendment not to buy or use them if they don't want to. And license plates saying for instance "Spay or Neuter your Pets" are even more obviously indistinguishable from the license plates at issue in this case. Indeed, the State of Tennessee in this appeal, not advocating reversal of the district court's injunction but urging us not to invalidate the entire specialty license plate program, offers no tenable basis for drawing a distinction between the dozens of government messages available on Tennessee plates and the "Choose Life" message.

Of course the unstated distinction is that the "Choose Life" message is highly controversial. With respect to the "Choose Life" message, much more than in

the above examples, there are large numbers of participants in the public discourse with an opposing view. Such a distinction, however, is entirely indefensible as a matter of First Amendment law, however much it might properly motivate the Tennessee legislature as a matter of policy. Such a distinction would fly in the face of the fundamental free speech principle that views expressed by substantial numbers are treated no differently by the First Amendment than extreme or way-out-of-the-mainstream views. Government speech disseminated by private volunteers, in other words, cannot have its constitutionality under the First Amendment depend on the small number of objectors to the government's message, or the extreme nature of their views.

In the absence of a tenable distinction, invalidating the Act in this case would effectively invalidate not only all those government specialty license plate provisions that involve a message that anyone might disagree with, but also effectively invalidate all manner of other long-accepted practices in the form of government-crafted messages disseminated by private volunteers. We are not provided with a sound legal basis for making such a leap.

We recognize that the Fourth Circuit has invalidated a nearly identical specialty license plate law in South Carolina. *See Planned Parenthood of S.C., Inc., v. Rose*, 361 F.3d 786 (4th Cir. 2004). In *Rose* Judge Michael enunciated a rationale that neither of the other two panel judges joined, although both concurred in the judgment. *See id.* at 800 (Luttig, J., concurring in the judgment); *id.* at 801 (Gregory, J., concurring in the

judgment). The reasoning of the Fourth Circuit judges is not persuasive, primarily for two reasons.

First, the Fourth Circuit opinions in *Rose* are in tension with the intervening case of *Johanns*. *Johanns* sets forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes. *Rose* relied instead on a pre-*Johanns* four-factor test of the Fourth Circuit's own devising that led to an "indeterminate result" on the crucial issue of whether "Choose Life" specialty plates express a government message. *Id.* at 793. The *Johanns* standard, by contrast, classifies the "Choose Life" message as government speech.

Second, none of the separate Fourth Circuit opinions explains how that court would treat such unexceptional examples of government-provided, privately disseminated speech as those described above. Without an articulated basis for distinguishing such examples, following the Fourth Circuit's lead in this case would invalidate wide swaths of previously accepted exercises of government speech. With no Supreme Court case requiring us to take such a step, we decline to do so.

IV.

For the foregoing reasons, the district court's order enjoining enforcement of the Act is REVERSED and REMANDED for proceedings consistent with this opinion.

BOYCE F. MARTIN, Jr., Circuit Judge, concurring in part and dissenting in part.

I concur in the Court's holding that the district court was not deprived of subject matter jurisdiction in this case by the Tax Injunction Act, 28 U.S.C. § 1341. With respect to the merits of the case, I would hold that Tennessee has unconstitutionally discriminated on the basis of viewpoint and would affirm the district court's decision enjoining the Choose Life license plate.[1]

I believe that there are two major flaws with the majority's analysis in this case. First, the majority fails to properly characterize the specialty license plate program. It seems apparent to me that the state created the specialty license plate program to facilitate private speech (notwithstanding the government speech aspects inherent

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[1] Perhaps of some interest, when this opinion is filed, at least three circuits (4th, 5th, and 6th) will have spoken on the issue, reaching at least three different conclusions, via at least sixteen separate opinions. Additionally, on March 6, 2006, in a non-precedential opinion, the Second Circuit addressed a near identical lawsuit — albeit in a different procedural posture — with the parties in reversed positions. *See Children First Foundation, Inc. v. Martinez*, 2006 WL 544502 (2d Cir. March 6, 2006) (unpublished). The Children First Foundation sued the state of New York when it denied the foundation's application for a Choose Life license plate. According to the foundation, the state committed unconstitutional viewpoint discrimination when it denied the application "based on their disagreement with [the] life-affirming viewpoint expressed by the plate." *Id.* at *1. The district court denied the defendant's motion to dismiss based on qualified immunity and the Second Circuit affirmed. The court noted that the state attempted to justify its decision based on the "government speech doctrine," but held that "custom license plates involve, at a minimum, some private speech" and that "it would not have been reasonable for defendants to conclude this doctrine permitted viewpoint discrimination in this case." *Id.*

in the issuance of a license plate), and *not* to promote a governmental message. This fact, even conceding that there must necessarily be some governmental speech involved in the issuance of license plates, requires that the government be viewpoint neutral.[2] Second, the majority errs by applying First Amendment compelled speech/subsidy doctrine to a case where, as the majority admits with respect to its analysis of the Tax Injunction Act, *nothing* is compelled. Because we are not dealing with compelled speech or compelled subsidies, I do not believe that the so-called government speech inquiry is wholly determinative of whether the First Amendment has been violated. Although the government may generally speak and control its own message, it may not suppress contrary messages because of their viewpoint in a forum designed to encourage a diversity of views from

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[2] *See Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004). The Fourth Circuit has held that specialty license plates embody a mixture of government speech and private speech. *Id.* at 793 (Opinion of Michael, J.) ("[T]he Choose Life plate embodies a mixture of private and government speech."); *id.* at 800 (Luttig, J., concurring in the judgment) ("[V]anity license plates are quintessential examples of such hybrid speech."). I agree that this is an adequate characterization of the nature of the specialty license plate. And, I agree that when faced with such a program, the government must remain viewpoint neutral. I find it more informative, however, to look beyond the specific "Choose Life" plate at issue and examine the purpose of the entire license plate forum. I would not limit my analysis to the inquiry — as the majority here does — of whether the Choose Life license plate alone is government or private speech. I believe that the majority errs in labeling the license plate as pure government speech and I also believe that it errs in not taking into account the nature of the license plate forum.

private speakers.[3]

I.

A. *Tennessee's speciality license plate program is a forum designed to encourage private speech, not a government program established to promote a governmental message.*

The majority focuses on the Choose Life license plate without considering the license plate program as a whole and frames the question as "whether a government-crafted message disseminated by private volunteers creates a 'forum' for speech that must be viewpoint neutral." This is itself a loaded question. First, it puts the cart before the horse by already deciding that the message is purely a governmental message. Second, by so phrasing, there is no doubt that the answer is "no." When the government crafts a message and disseminates it, the simple act of the government speaking does not create a forum that invites competing viewpoints. Although the majority answers this question, it is not determinative of the case.[4] Putting aside the question as to whether

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[3] It also bears mentioning that the State of Tennessee is not even a party to this appeal. The state acquiesced in the district court's decision and has appeared solely in response to the intervenors to request that we not strike down the entire license plate program. The party advocating the Choose Life license plate is a *private* organization.

[4] Moreover, the manner in which the majority presents and answers the question is misleading — are we really to conclude that the Tennessee government has established a program to disseminate all of the individual messages on the various license plates. That is, did

specialty license plates represent "a government-crafted message" — and I do not believe that they do — the proper question is *not* whether when the government speaks must it always allow others to speak, but whether a forum exists in which speech is occurring, and if so, whether the government may suppress a disfavored message based on its viewpoint.

Thus, I would start by determining the overall purpose of the speciality license plate program. When this is done, viewing the license plate program as a whole, and taking account of the fact that the government engages in speech by providing the actual license plates, it becomes clear that the speciality license plate "program was designed to facilitate private speech, not to promote a governmental message." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001); *Rosenberger v.*

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the Tennessee government decide to establish a program promoting Penn State Alumni Pride and seek out private volunteers to transmit this message to the public at large? Did the Tennessee government decide to establish a program promoting the University of Florida (the University of Tennessee's arch-rival in football, *see* Gator Hater, http://www.gator-haters.com/Tennessee/index_TN.shtml (last visited March 10, 2006) (a website run by University of Tennessee fans dedicated to their rivalry with the University of Florida, including news, jokes, and recipes for cooking alligator meat)), and does the State seek out private volunteers to promote the University of Florida to its citizens? It is a nice academic exercise to hypothesize that the license plate program is a governmental program to disseminate through private volunteers all of the state's various messages, but it seems to me to be a conclusion that only judges banished to our ivory towers and shut off from the real world could reach. *See also Children First Foundation*, 2006 WL 544502 (holding that no reasonable person would believe that the government speech doctrine permits viewpoint discrimination in the specialty license plate context).

Rector and Visitors of Univ. of Va., 515 U.S. 819, 834 (1995). This conclusion, in contrast to the majority's, would require Tennessee's license plate program to be viewpoint neutral.

Tennessee requires all motor vehicles to have a license plate. Motorists can choose from ordinary license plates created by the Tennessee government or they can pay extra for personalized and specialty license plates. There are several standard Tennessee plates and there are approximately 150 specialty plates. As the majority notes, the specialty plates are created in consultation with private organizations and half of the profits may be devoted to the private non-profit organizations sponsoring the plates.

In my opinion, the fact that the state has permitted approximately 150 private organizations to create specialty license plates and the manner in which the state operates its license plate program demonstrates that the forum was created to facilitate private speech. *See Rosenberger*, 515 U.S. at 829-30 (analyzing forum); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001) (applying forum analysis where private speech occurs on government property); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-91 (1993) (same); *Sons of Confederate Veterans, Inc. v. Commissioner of the Va. Dep't. of Motor Vehicles*, 288 F.3d 610, 622 (4th Cir. 2002) (noting that where private speech is at issue, restrictions must be viewpoint neutral regardless of type of forum); *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (same). The organizations with specialty license

plates are numerous and diverse.[5] The majority claims, however, in concluding that *all* of the license plates are pure government speech, that "there is nothing implausible about the notion that Tennessee would use its

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[5] The plates include for "Clubs/Groups": Alpha Kappa Alpha, Alpha Phi Alpha, Delta Sigma Theta, Ducks Unlimited, Fraternal Order of Police, Int'l Assoc. of Firefighters, Kappa Alpha Psi, Mothers Against Drunk Driving, Masons, Omega Psi Phi, Phi Beta Sigma, Tennessee Police Benevolent Association, and Zeta Phi Beta. Under "Military/Veterans": Bosnia Veteran, Bronze Star Meritorious, Bronze Star Valor, Desert Storm Veteran, Disabled Veteran, Enemy Evadee, Handicapped Veteran, Honorably Discharged Veteran, Korean War Veteran, Legion of Valor, Medal of Honor, Military, National Guard, Pearl Harbor Survivor, Prisoner of War, Purple Heart, Silver Star, Vietnam Veteran, and WWII Veteran. Collegiate Plates include: Alabama, APSU, Arkansas, Auburn, Belmont, Bryan College, Carson-Newman, Clemson University, Cumberland, ETSU, Florida State, Freed-Hardeman, Georgia Tech, Indiana, Kentucky, King College, Lane College, Lee University, LeMoyne-Owen, Lipscomb University, Maryville College, Memphis, Milligan College, Mississippi State, MTSU, Penn State, Purdue University, Rhodes, Tennessee Tech, Tennessee Wesleyan, Trevecca Nazarene, TSU, Tusculum College, Union, University of Florida, University of Mississippi, University of the South, UT-Chattanooga, UT-Generic, UT-Knoxville, UT-Martin, Vanderbilt, and Virginia Tech. Miscellaneous plates include: American Eagle Foundation, Agriculture, Animal Friendly, Antique, Automobile/Motor Home, Children First, Consular, East Tennessee Children's Hospital, Environmental, Fish and Wildlife Species - Bear, Fish and Wildlife Species - Turkey, Friend of the Smokies, Helping Schools, Le Bonheur Children's Medical Center, Prince Hall Masons, Radnor Lake, Sons of Confederate Veterans, Sportsman, St. Jude, Tennessee Arts Commission (Cat, Fish, or Rainbow), Tennessee Walking Horse, U.S. Olympic, UT Football Championship, Lady Vols Championship, Vanderbilt Children's Hospital, and Watchable Wildlife. *See* Tennessee Department of Safety, *Speciality Plates Main Menu, available at http://state.tn.us/safety/plates.html* (last visited March 10, 2006). *See also* TENN. CODE ANN. § 55-4-202.

license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges." There may be nothing implausible about the majority's concept in the abstract;[6] here, however, the evidence is clear that Tennessee wished to create a forum for private speakers. It cannot be ignored that the license plates represent a wide-array of viewpoints, some arguably conflicting, and many not germane to any governmental interest. *See Legal Services Corp.*, 531 U.S. at 543 ("And in *Rosenberger,* the fact that student newspapers expressed many different points of view was an important foundation for the Court's decision to invalidate viewpoint-based restrictions.") (citing *Rosenberger*, 515 U.S. at 836); *Sons of Confederate Veterans, Inc. v. Commissioner of the Va. Dep't. of Motor Vehicles*, 305 F.3d 241, 242-43 (4th Cir. 2002) (Williams, J., concurring in the denial of rehearing en banc) ("In essence, the Commonwealth has opened its license plates to myriad private speakers but wishes to restrict the message one of those speakers would express based on its disagreement with the viewpoint contained therein.").

In addition to acknowledging the viewpoints already expressed in the forum, it is helpful to look at how Tennessee actually operates the forum in practice. First, the State's own application for a "personalized," "specialty," or "special" license plate advertises, "SHOW *YOUR* SCHOOL SPIRIT" (emphasis added) and "SUPPORT *YOUR* CAUSE AND COMMUNITY."

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[6] I wonder whether there is a number at which the majority would concede that private speech is at work. Maryland has approximately 500 different specialty license plates. Would that be enough to demonstrate that the state is encouraging private speech?

(emphasis added). It does *not* say, "SUPPORT THE GOVERNMENT'S MESSAGE." Additionally, a June 22, 2005 press release from the Governor's office informs that the state "currently issues nearly 150 different license plates to reflect *drivers'* special interests, such as schools, wildlife preservation, parks, the arts and children's hospitals." (emphasis added).[7]

I would contrast specialty plates with Tennessee's own plates where it does intend to convey a governmental message. For example, a new Tennessee plate issued in January 2006 was issued because "[Governor] Bredesen felt strongly [that the plate] should reflect the natural beauty of the state." Press Release, *available at http://tennessee.gov/safety/newsreleases/newplate.htm* (last visited March 10, 2006). Bredesen stated that he wanted "this new plate to reflect the magnificence of our

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[7] It is also curious that the government, if it wished to speak and promote a message, would first require at least 1,000 individuals to pay the government before it agreed to disseminate the message. *See also Sons of Confederate Veterans*, 288 F.3d at 620 ("If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before its 'speech' is triggered."). In fact, in this case, Tennessee does not expend any funds of its own. The entire license plate is funded by the private purchasers. All that Tennessee provides is the medium — the actual metal license plate — for the groups to design and display their messages. And in providing this medium, the government has created a means by which favored groups can promote their messages and raise funds, but the government has prevented a disfavored group from having the same access to the forum. Contrary to the majority's suggestion, however, adopting this approach does not mean that the state has to authorize a plate for every individual or group that requests one. The state may adopt reasonable and viewpoint neutral regulations to administer the license plate program in a manner consistent with the program's objectives.

state, as well as to serve as a symbol of the pride Tennesseans feel to live on such a beautiful land." That same press release notes that "[t]he Tennessee Department of Safety issues approximately 5.4 million passenger auto plates each year . . . . In addition, the state currently issues nearly 150 different license plates to reflect *drivers' special interests*, such as schools, wildlife preservation, parks, the arts and children's hospitals." *Id.*

Although there may be nothing "implausible" about a government establishing a license plate program in order to promote purely governmental messages, I believe the majority ignores the reality of the situation here — Tennessee is not promoting its own messages, but rather has "expend[ed] funds [or provided governmental property in the form of the license plate itself] to encourage a diversity of views from private speakers." *Legal Services Corp.*, 531 U.S. at 542 (quoting *Rosenberger*, 515 U.S. at 834).[8] In this case, "[a] page of history is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

B. The majority errs by applying the

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[8] Although I would not necessarily find the following points controlling, there is also additional support for my conclusion that the messages are not governmental in nature. Many of the messages are not germane to governance (for example, the plates promoting antiques, numerous out-of-state universities, Ducks Unlimited, and various others). The Fellowship of Christian Athletes may beg other First Amendment questions if it is *promoted* by the government. I would also question whether Tennessee wishes to *promote* the Sons of Confederate Veterans plate, bearing the Confederate Flag as its design. I find it telling that in this appeal, the state did not claim to be "promoting" these messages.

compelled speech/subsidy doctrine in a case where nothing is compelled.

Aside from having mischaracterized the purpose of the specialty license plate program, the majority also applies the wrong First Amendment doctrine. For purposes of the Tax Injunction Act inquiry, the majority properly concludes that the payments for specialty license plates are voluntary and not compelled. Nevertheless, when it turns to the merits of the First Amendment inquiry, the majority ironically treats this case as if it were a *compelled* speech or compelled subsidy case. I part ways with the majority because it I do not agree that *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055 (2005) is controlling, and the majority relies almost exclusively on *Johanns*. The majority apparently takes *Johanns* to mean that the sleeping doctrine of "government speech" has been awakened and now controls all First Amendment analysis. I disagree.

Johanns is a case that addresses *compelled* subsidies — that is, the government forced someone to give it money to pay for speech. In *Johanns*, the Supreme Court described the "two categories of [compelled speech] cases." *Id.* at 2060. The first category is true compelled speech cases — i.e., cases where "an individual is obliged personally to express a message he disagrees with, imposed by the government." *Id.* In this category, the Court has taken a strong stand and invalidated "outright compulsion." *Id.*; *see West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (prohibiting state from requiring schoolchildren to recite the Pledge of Allegiance while saluting the American flag, on pain of expulsion); *Wooley v. Maynard*, 430 U.S.

705 (1977) (holding that requiring the plaintiffs to bear the state's motto, "Live Free or Die," was impermissible compulsion of expression). The second category of cases is compelled subsidy cases — that is, cases "in which an individual is required by the government to subsidize a message he disagrees with." *Johanns*, 125 S. Ct. at 2060. There are two subcategories to the compelled subsidy cases: (a) compelled subsidies to support a *private* entity's political message, *see Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), and (b) compelled subsidies to support the *government's* message. It is in this subcategory — compelled subsidies to support the government's message — that *Johanns* fits.[9] Thus, in compelled subsidy cases, the determinative issue is whether the speech is the government's (which is immune from First Amendment challenge) *or* a private entity's speech, which is unconstitutional, *see Keller*, 496 U.S. 1; *Abood*, 431 U.S. at 209.

The reason is simple when one thinks of what the First Amendment harm is in each situation. When there is a compelled subsidy, the harm is being forced to give the government money to pay for someone else's message. When that message is another private message (despite tangential government involvement), the First Amendment is violated. *See Keller*, 496 U.S. 1; *Abood*, 431 U.S. 209; *see also* 5 The Founders' Constitution, §

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[9] *See also United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . .").

37, A Bill for Establishing Religious Freedom, p. 77 (1987), codified in 1786 at VA. CODE ANN. § 57-1 (Lexis 2003) (where in 1779, Thomas Jefferson wrote that "to compel a man to furnish contributions of money for the propogation of opinions which he disbelieves, is sinful and tyrannical"). When the message is the government's own, however, the harm is alleviated for First Amendment purposes. This is because, of course, the government must be able to tax and spend in order to function. *See Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies."); *see also Keller*, 496 U.S. at 12-13 ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."). The First Amendment harm in this case, however, has nothing to do with being forced to speak or to subsidize a message. Rather, the harm is being denied the opportunity to speak on the same terms as other private citizens within a government sponsored forum. In this situation, whether the particular Choose Life message is the government's own or private speech, the First Amendment harm is not alleviated for the persons denied access.[10] Thus, the government speech doctrine, a la

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[10] This is particularly why the question is not whether a hypothetically government-sponsored message itself "creates" a

Johanns, is not the determinative question in this case. The specialty license plate issue at hand does not involve compelled speech. It does not involve a compelled subsidy for a private entity. And, it does not involve a compelled subsidy to support a government message.

The majority here, however, extrapolates the so-called government speech doctrine from the compelled subsidy context of *Johanns*, and applies it, apparently, without limit, in all First Amendment cases. I disagree with this approach. First, if the majority's analysis applied to *Barnette*, *Wooley*, *Keller*, and *Abood*, the outcomes of all of those cases certainly could have been different. The majority here found several facts relevant to its decision. First, the government "crafted" the message. The same could be said in the earlier cases. The Pledge of Allegiance is the government's message. New Hampshire's government "crafted" its own motto. Based on the majority's broad interpretation of government involvement in speech, the fact that the government compelled membership and dues payments in *Keller* and *Abood*, could be interpreted to fall within the majority's understanding of government speech. The government had ultimate control over all of these messages. In each of those cases, the facts the majority found relevant here would indicate that the message was the government's own. But, this was not the approach the Supreme Court took, and I would not take it here either, because it ignores the First Amendment interests at issue.

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forum. When the majority answers "no" to the misleading question it poses, the proper First Amendment question is still not answered because there are another one-hundred fifty other private speakers in the broader license plate forum.

The government speech doctrine, as it is used in *Johanns*, is more appropriately utilized in the compelled subsidy context, where who is speaking is determinative, and if it is the government, consistent with its broad taxing authority, that speech is immune from First Amendment challenge. *Johanns*, 125 S. Ct. at 2068 (Souter, J., dissenting) ("[T]he Government argues here that the beef advertising is its own speech, exempting it from the First Amendment bar against extracting special subsidies from those unwilling to underwrite an objectionable message.").[11] Thus, if the plaintiffs here, who presumably disagree with the "Choose Life" message, were *compelled* to subsidize the production and distribution of "Choose Life" license plates, then *Johanns* would be on all fours with this case.[12] We face an

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[11] Justice Souter noted that while the government speech doctrine is in its early stages of development, two points are clear: "The first point of certainty is the need to recognize the legitimacy of government's power to speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard." *Id.* at 2070 (Souter, J., dissenting); *id.* (discussing government's need to avoid "heckler's veto of any forced contribution"). "The second fixed point of government-speech doctrine is that the First Amendment interest in avoiding forced subsidies is served, though not necessarily satisfied, by the political process as a check on what government chooses to say." *Id.* at 2070-71 (Souter, J., dissenting); *id.* at 2071 (discussing "[t]he adequacy of the democratic process to render subsidization of government speech tolerable"). *Johanns* is very clearly about targeted assessments and forcing those who disagree with a particular message to *fund* it.

[12] The majority is mistaken therefore, in reading *Johanns* as a watershed First Amendment case. It may be a watershed *compelled subsidy* case, but it is not revolutionary and does not transform all

entirely different situation, however, and therefore *Johanns* is not determinative.

C. *The "government speech" doctrine does not permit viewpoint discrimination when the government encourages a diversity of views from private speakers.*

The Supreme Court's precursor cases to *Johanns*, *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Legal Services Corp.*, are instructive, as well as the Court's viewpoint discrimination cases. The majority briefly considers *Rust*, but misinterprets its holding and improperly applies it to this case. In *Rust*, Congress established Title X of the Public Health Service Act, "which provides federal funding for family planning services." *Id.* at 178. The Act authorizes the Secretary of the Department of Health and Human Services to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family

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First Amendment doctrine. The *Johanns* dissent is instructive on this point. The contention was not over whether the government can ever compel a subsidy for its own message — it can — but over the concept of transparency. That is, when the government speaks, must it identify itself clearly as the speaker? *Id.* at 2069 (Souter, J., dissenting) ("The error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own."); *id.* at 2072 (asserting that transparency requires knowing whether "Uncle Sam is the man talking behind the curtain"); *id.* at 2073 ("It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them.").

planning projects which shall offer a broad range of acceptable and effective family planning methods and services." *Id.* (quoting 42 U.S.C § 300(a)). Thus, in *Rust*, Congress established a federal program which allowed the Secretary to provide *grants* to family planning projects that complied with the terms of the grants.

The Court rejected the plaintiffs' First Amendment claim stating that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 193; *id.* (noting that the government "has merely chosen to fund one activity to the exclusion of the other"). Thus, restrictions imposed upon federal grants, are permissible in certain circumstances when simply "designed to ensure that the limits of the federal program are observed." *Id.*; *but see Legal Services Corp.*, 531 U.S. 533. The Court characterized the case, not as one where the government seeks to suppress an idea, but rather a "prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Rust*, 500 U.S. at 194. Thus, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.*

The Court focused on the fact that the program at issue involved a federal *subsidy*. *Id.* at 199 n.5 ("First, Title X subsidies are just that, subsidies."). Consequently, the complaining parties in *Rust* could simply have declined to accept federal assistance. But,

by voluntarily accepting federal monies, "a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income." *Id.*

Contrary to the majority's insinuation here, the holding of *Rust* is not limitless and the Supreme Court itself explicitly stated as much. The Court stated that its holding was "not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." *Id.* at 199. Accordingly, the Court "has recognized that the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity.'" *Id.* at 199-200 (quoting *United States v. Kokinda*, 497 U.S. 720, 726 (1990) (additional citations omitted)). It proves too much to suggest, as the majority does, that any government involvement in speech turns that speech into government speech immune from First Amendment restrictions. Thus, Tennessee's license plate program falls not within the broader holding of *Rust*, but within the Court's caveat that the government, despite some involvement and despite providing a subsidy of sorts (here, providing the license plates for the messages), may not restrict speech in areas it has designed to facilitate private speech.

The Court later resolved a similar question in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), where it addressed the Legal Services Corporation Act. The Act established the Legal Services Corporation

whose "mission is to distribute funds appropriated by Congress to eligible local grantee organizations 'for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.'" *Id.* at 536 (quoting 42 U.S.C. § 2996b(a)). The grants provided contained a restriction that prohibited "legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law." *Id.* at 536-37. The plaintiffs challenged the restriction, arguing that it constituted impermissible viewpoint discrimination in violation of the First Amendment. The United States relied upon *Rust v. Sullivan*.

The Court noted that in *Rust*, it "did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech" but "when interpreting the holding in later cases, however, [the Court] ha[s] explained *Rust* on this understanding." *Id.* at 541. The Court acknowledged that viewpoint based *funding* decisions can be sustained where "the government is itself the speaker" or, "like *Rust*" where the government "used private speakers to transmit specific information pertaining to its own program." *Id.* (citations and quotations omitted). The majority here latches onto the idea that Tennessee is using private speakers to disseminate its Choose Life message—that is, the license plate program is "like *Rust*." As I have discussed above, however, *Rust* included a caveat that the majority fails to acknowledge. Because of that failure, the majority does not properly characterize the specialty license plate program, and it does not properly consider whether the specialty license plate

forum has been traditionally open to the public for expressive activity. *Rust*, 500 U.S. at 199-200.

As the Supreme Court held, contrary to the majority's belief here, "[n]either the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however. As we have pointed out, '[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.'" *Id.* at 542 (quoting *Rosenberger*, 515 U.S. at 834). Distinguishing *Legal Services Corp.* from *Rust*, the Court stated that "the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message." *Id.* So too, the salient point here is that the license plate program was designed to facilitate private speech and to encourage a diversity of viewpoints from private speakers, not to promote a governmental message. "The state would argue that its viewpoint discrimination is permissible, because its license plates constitute pure government speech. But the speech here only becomes speech by virtue of a citizen's choice." *Planned Parenthood of South Carolina v. Rose*, 373 F.3d 580 (4th Cir. 2004) (Wilkinson, J., concurring in the denial of rehearing en banc); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n. 9 (11th Cir. 2003) ("Furthermore, the program is structured to benefit the organizations that apply for and sponsor the plates, not the State itself. We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government

speech."). The majority dodges this point by looking at the license plate program as if the Choose Life license plate were the only plate in the entire state of Tennessee. That way, the majority characterizes the Choose Life plate as an isolated instance of a government message disseminated by private volunteers without considering the program as a whole. If we think of each individual license plate in a vacuum, each one can be reasonably characterized as a government message. But, in order to properly characterize the specialty license plate program for First Amendment purposes, we cannot view each license plate in isolation. I suggest that when opening one's eyes to the license plate program as a whole, it is evident that the government has created a program to encourage a diversity of views and messages from private speakers.

II.

With the preceding First Amendment doctrine issues in mind, I would hold that Tennessee created a forum to encourage a diversity of viewpoints from private speakers and therefore the Constitution requires viewpoint neutrality. In *Rust*, "the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833 (describing *Rust*). This is not a *Rust* case despite the majority framing it as such. *See also Sons of Confederate Veterans*, 305 F.3d at 246 (Luttig, J., respecting the denial of rehearing en banc) ("When a special license plate is purchased, it is really the private citizen who engages the government to publish *his* message, not the government who engages the private individual to publish *its*

message, as in cases like Rust v. Sullivan [ ] *and Wooley v. Maynard*, for example.").

The specialty license plate program itself has been open and available to a wide-range of private speakers to promote their own messages. The government's participation in the process by providing the actual license plate "in the form of Government-owned property, does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity." *Rust*, 500 U.S. at 199-200 (internal quotation marks and citation omitted). Moreover, the government speech rationale does not apply whenever the government somehow has its hands or its money involved. "It does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 542 (quoting *Rosenberger*, 515 U.S. at 834); *see also Sons of Confederate Veterans*, 305 F.3d at 246 (Luttig, J., respecting the denial of rehearing en banc) ("No one, upon careful consideration, would contend that, simply because the government owns and controls the forum, all speech that takes place in that forum is necessarily and exclusively government speech. Such would mean that even speech by private individuals in traditional public fora is government speech, which is obviously not the case.").

Finally, I also cannot subscribe to my colleagues' melodramatic doomsday predictions about what would occur should we hold that the Constitution requires that Tennessee's specialty license plate program be viewpoint

neutral. The majority claims that viewpoint neutrality will require the state to issue Ku Klux Klan and American Nazi Party specialty license plates. The simple answer in response to this suggestion is: Well of course that's true if viewpoint neutrality means anything. That is the same reason that Tennessee cannot prevent the KKK or Nazi Party from getting parade licenses on the same terms as other groups and the same reason that Tennessee cannot prevent these groups from espousing their views in the town squares.

Additionally, what my colleagues seem to miss, is the fact that Tennessee *already* authorizes a Sons of Confederate Veterans license plate bearing the emblem of the Confederate Flag. To some, the Confederate flag is a symbol of pride in one's heritage. *See Sons of Confederate Veterans*, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing en banc) (noting that some people "view the Confederate flag as symbolically celebrating their line of descent"). To many others, however, the Confederate flag is a symbol that is just as offensive as the examples my colleagues put forth. *See Storey v. Burns Int'l Security Services*, 390 F.3d 760, 763 n.5 (3d Cir. 2004) ("One of the Confederacy's key beliefs, as its Constitution readily asserted, was the interminable white man's right to own black slaves. The battle flag of the Confederacy, then, [can be interpreted as] an exclusionary message that stigmatizes blacks as outsiders of the political community.") (quoting Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 Temp. L. Rev. 539, 557 (2002) (footnotes omitted)); *see also Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 822-24 (4th Cir.2004) (en banc) (Gregory, J., concurring) ("Moreover, common

sense suggests that such problems are not readily resolved merely because symbols such as a Confederate flag may be accompanied with slogans such as 'heritage not hate,' because a symbol's significance often lies 'in the eye of the beholder.' [T]o its supporters at the time of its creation as well as some proponents today . . . the Confederate flag undeniably represented, and represents, support for slavery, . . . and opposition to the Republic."). The majority's invocation of KKK and Nazi Party license plates is a red herring.

Moreover, Tennessee can constitutionally maintain viewpoint neutral regulations, such as the one already in place requiring at least 1,000 paid specialty plate orders before a plate is issued. *See Good News Club*, 533 U.S. at 106-07 (discussing the difference between subject matter regulations and viewpoint discrimination). If the KKK and Nazi Party are able to pull together 1,000 proud, dues-paying members, who wish to display such license plates on their cars, however, they are entitled to do so the same as the Sons of Confederate Veterans, Penn State Alumni, antique afficionados, and members of pro-life and pro-choice organizations. There is also no evidence that the doomsday scenario the majority predicts has occurred in the Fourth Circuit. The government has not ceased to function. The state governments are not inundated with frivolous license plate proposals. The roads are not overcrowded with KKK license plates and license plates advocating reckless pet breeding.

In raising such examples as my colleagues do here, they seem to forget about the core purpose of the First Amendment. "[T]he First Amendment was not

written for the vast majority of [Tennesseans]. It belongs to a single minority of one." *Sons of Confederate Veterans*, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing en banc). That currently disfavored messages are entitled to First Amendment protection should come as a shock to no one. In this case, the Choose Life message could easily have been Pro-Choice and the positions of the parties reversed. *See Children First Foundation*, 2006 WL 544502 (choose life organization suing state and arguing that viewpoint neutrality is required in specialty license plate forum); *Planned Parenthood of South Carolina*, 373 F.3d at 581 (Wilkinson, J., concurring in the denial of rehearing en banc). The First Amendment principles, however, remain the same.

III.

For the foregoing reasons, I would affirm the district court's decision enjoining the issuance of the Choose Life license plate.

In The United States District Court For the Middle District of Tennessee at Nashville

AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, et al.

v.

Philip BREDESEN, et al.

No. 3:03-1046.

Sept. 24, 2004.

MEMORANDUM

CAMPBELL, District Judge.

Pending before the Court are Defendant Friends of the Great Smoky Mountains National Park, Inc.'s Motion for Partial Summary Judgment (Docket No. 78), Defendants Bredesen and Phillips' Motion for Summary Judgment (Docket No. 82), Intervenor New Life Resources, Inc.'s Motion for Summary Judgment (Docket No. 87), and Plaintiffs' Motion for Summary Judgment (Docket No. 90). The Court heard argument on the pending Motions on September 23, 2004.

For the reasons explained herein, Plaintiffs' Motion for Summary Judgment (Docket No. 90) is GRANTED. The Court finds that the "Choose Life" license plate statute at issue, Tennessee Code Annotated, § 55-4-306, violates the First Amendment, and it is enjoined as unconstitutional. The Court need not, and

does not, reach the issue of whether Tennessee's entire license plate program is unconstitutional.

Defendant Friends of the Great Smoky Mountains National Park, Inc.'s Motion for Partial Summary Judgment (Docket No. 78) is DENIED, Defendants Bredesen and Phillips' Motion for Summary Judgment (Docket No. 82) is DENIED, and Intervenor New Life Resources, Inc.'s Motion for Summary Judgment (Docket No. 87) is DENIED.

FACTS

This action was filed by the American Civil Liberties Union of Tennessee, Planned Parenthood of Middle and East Tennessee, Inc., Sally Levine, Hilary Chiz, and Joe Sweat, Plaintiffs, against Defendants Philip Bredesen (Governor of the State of Tennessee) and Fred Phillips (Tennessee Commissioner of Safety), in their official capacities.

Plaintiffs challenge the constitutionality of a Tennessee statute, Tennessee Code Annotated § 55-4-306, which makes available a specialty license plate with the words "Choose Life." Plaintiffs also alternatively challenge the constitutionality of the State of Tennessee's policy and practice of issuing specialty license plates in general, found at Tennessee Code Annotated § 55-4-201, *et seq.*

Plaintiffs contend that the "Choose Life" statute violates the First Amendment right of free speech. This case is about speech and not about abortion or adoption.

On March 3, 2004, the Court granted a Motion to Intervene filed by New Life Resources, Inc., a non-profit Tennessee corporation which is the principal direct financial beneficiary of the "Choose Life" license plate plan authorized by Tennessee Code Annotated, § 55-4-306. Docket No. 47. On June 15, 2004, the Court granted an unopposed Motion to Intervene filed by Friends of the Great Smoky Mountains National Park, Inc. Docket No. 74.

Under Tennessee law, the Tennessee Department of Safety is authorized to issue personalized license plates, collegiate license plates, cultural license plates, specialty earmarked license plates, new specialty earmarked license plates[1] and others. TENN. CODE ANN. § 55-4-210. The statute at issue herein, the "Choose Life Act," authorizes a specialty plate which bears the "Choose Life" slogan or logo. TENN. CODE ANN. § 55-4-306. The plate is effectively designed by its private sponsor, New Life Resources, Inc., and approved by the State. The decision to pay extra money to purchase a "Choose Life" license plate is voluntary. The General Assembly has rejected passage of a "Pro-Choice" specialty license plate statute. Docket No. 122.

Plaintiffs contend that the statute (and,

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[1] "Specialty earmarked plates" are those motor vehicle registration plates authorized by statute prior to July 1, 1998, in which the statute earmarks the funds produced from the sale of the plates to be allocated to a specific organization, state agency or fund, or other entity to fulfill a specific purpose or to accomplish a specific goal. TENN. CODE ANN. § 55-4-209(6). "New specialty earmarked plates" are those "specialty earmarked plates" authorized by statute after July 1, 1998. TENN. CODE ANN. § 55-4-209(4).

alternatively, the entire specialty license place program) infringes their First and Fourteenth Amendment rights through viewpoint discrimination and the unfettered discretion given to the General Assembly.

All parties have filed Motions for Summary Judgment. For the reasons explained herein, Plaintiffs' Motion for Summary Judgment is granted, and Defendants' Motions for Summary Judgment are denied.

SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Id.*; *Bob Tatone Ford. Inc. v. Ford Motor Co.*, 197 F.3d 787, 790 (6th Cir. 1999).

To prevail, the non-movant must show sufficient evidence to create a genuine issue of material fact. *Williams*, 186 F.3d at 689. A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Entry of summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Williams, 186 F.3d at 689.

A dispute about a material fact is "genuine" within the meaning of Rule 56 only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 106 S. Ct. at 2510. The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989).

VIEWPOINT DISCRIMINATION[2]

The State Defendants argue that because the "Choose Life" statute is purely governmental speech, there are no constitutional constraints on that speech under the First Amendment.[3] In determining whether the State of Tennessee engaged in viewpoint discrimination in violation of the First Amendment when it authorized the "Choose Life" license plate, the Court must determine whether the alleged "speech" is purely government speech. The Court finds that it is not.

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[2] Contrary to Defendants' assertions, Plaintiffs have standing to bring their claims based upon their constitutional First Amendment injuries, as explained in the Court's prior ruling on Defendants' Motions to Dismiss. *See* Docket No. 55.

[3] Both counsel for Defendant New Life Resources, Inc. and counsel for the Friends of the Great Smoky Mountains conceded, at oral argument, that the speech at issue herein is "mixed" speech, both government and private.

As in *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 793-94 (4th Cir. 2004), the Court finds that both the State and the individual vehicle owner are speaking. The Court adopts the Fourth Circuit's four-factor test and finds: "The State speaks by authorizing the Choose Life plate and creating the message, all to promote the pro-life point of view; the individual speaks by displaying the Choose Life plate on her vehicle. Therefore, the speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two." *Id.* at 794; *see also Henderson v. Stalder*, 265 F. Supp. 2d 699, 717 (E.D. La. 2003).[4]

In *Sons of Confederate Veterans, Inc., v. Commissioner of Va. Dept. of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), another case involving specialty license plates, the Fourth Circuit stated: "If the General Assembly intends to speak, it is curious that it requires the guaranteed collection of a designated amount of money from private persons before the 'speech' is triggered." *Id.* at 620. Similarly, here, the State required a minimum order of at least one thousand plates prior to initial issuance and payment of an additional $35 fee per license plate before the "speech" on the "Choose Life" license plate was "triggered." TENN. CODE ANN. § 55-4-201(b)(2) and (h)(1).

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[4] "The participants in the license plate scheme seek to express a point of view, a private point of view. In order to do so, they must find legislators willing to sponsor a bill and be an organization that is so non-controversial that the bill passes and a plate is created. These plates do not spring from the head of the legislature like Athena from the head of Zeus." *Henderson*, 265 F. Supp. 2d at 717.

The Supreme Court has made clear that the principal inquiry in assessing a claim of viewpoint discrimination is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys. *Rose*, 361 F.3d at 795 (citing *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989)). Viewpoint discrimination can occur if the regulation promotes one viewpoint above others, and — as in *Rose* — that is precisely what has happened here. *Id.*

The government may not regulate speech based on its substantive content or the message it conveys. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 115 S.Ct. 2510, 2516 (1995). Viewpoint discrimination by the State against speech because of its message is presumed to be unconstitutional. *Id.* The government may not target particular views taken by speakers on a subject in an effort to discourage one viewpoint and advance another. *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1102 (D. Md. 1997) (citing *Rosenberger*). Nor may the government restrict speech based on the specific motivating ideology or the opinion or perspective of the speaker. *Id.* "When the government denies access to speakers to suppress their point of view, 'the violation of the First Amendment is all the more blatant.'" *Id.* (quoting *Rosenberger*).

In this case, the State of Tennessee has allowed the "Choose Life" viewpoint to the exclusion of "Pro-Choice" and other views on abortion. Even if the government can selectively fund one activity and not another, as argued by Defendants, citing *Rust v. Sullivan*,

500 U.S. 173, 193 (1991), it is the individual citizen, not the government, who "funds" the extra costs and speech of the "Choose Life" license plate.

This conclusion holds no matter what type of forum the license plate is considered to be-traditional public forum, designated public forum, or non-public forum. Because the State has established a license plate forum for the abortion debate, it cannot limit the viewpoints expressed in that forum. *See, e.g., Rose*, 361 F.3d at 798. The type of forum that exists is relevant only if the logo or message is viewpoint-neutral. *Sons of Confederate Veterans*, 288 F.3d at 623. "Choose Life" is not viewpoint-neutral speech.

The statute at issue makes clear that the State of Tennessee is willing to use its considerable power and resources to control private speech and to discriminate based on viewpoint. The First Amendment makes clear, however, that the State cannot do so constitutionally.

The Court finds that the statute at issue, Tennessee Code Annotated, § 55-4-306, is unconstitutional because the State of Tennessee, through this statute, discriminates based upon viewpoint. The State Defendants, therefore, are hereby enjoined from enforcing the "Choose Life" statute, Tennessee Code Annotated, § 55-4-306. The result in this case would be the same if the statute authorized a "Pro-Choice" license plate instead of the "Choose Life" license plate. Either way, it is unconstitutional viewpoint discrimination in violation of the First Amendment.

Plaintiffs have asked the Court, alternatively, to

enjoin the entire license plate program. Complaint (Docket No. 1), Request for Relief. Because the Court finds the particular "Choose Life" statute to be unconstitutional, it need not, and does not, reach the question of whether the entire license plate program is unconstitutional.

IT IS SO ORDERED.

/s/ Todd J. Campbell
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, et al.

v.

PHILIP BREDESEN, et al.

NO. 3:03-1046

March 12, 2004

JUDGE CAMPBELL

MEMORANDUM

Pending before the Court are Defendants' Motions to Dismiss (Docket Nos. 34 and 50). The Court heard oral argument on Defendants' Motions on March 11, 2004. For the reasons stated herein, the Motions to Dismiss are DENIED.

FACTS

This action was filed by the American Civil Liberties Union of Tennessee, Planned Parenthood of Middle and East Tennessee, Inc., Sally Levine, Hilary Chiz, and Joe Sweat, Plaintiffs, pursuant to 42 U.S.C. § 1983, against Defendants Philip Bredesen (Governor of

the State of Tennessee) and Fred Phillips (Tennessee Commissioner of Safety), in their official capacities.

Plaintiffs challenge the constitutionality of a Tennessee statue, TENN. CODE ANN. § 55-4-306, which makes available a specialty license plate with the words "Choose Life." Plaintiffs also challenge the constitutionality of the State of Tennessee's policy and practice of issuing specialty license plates in general. Tennessee Code Annotated § 55-4-201, *et seq.*

Defendants have moved to dismiss Plaintiffs' action for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, on the grounds that Plaintiffs lack standing to bring this action and that the case is not ripe for decision. Docket No. 35, p. 1.

There are, in Tennessee, several types of license plates. *See* TENN. CODE ANN. §§ 55-4-101, *et seq.* The Tennessee Department of Safety is authorized to issue personalized plates, collegiate plates, cultural plates, specialty earmarked plates and others. TENN. CODE ANN. § 55-4-210. All specialty plates must be authorized by the General Assembly first, however, through the enactment of a specific statute. TENN. CODE ANN. § 55-4-201, *et seq.*

Plaintiffs challenge the "Choose Life Act," TENN. CODE ANN. § 55-4-306, which was passed by the General Assembly and authorizes a specialty plate which bears the "Choose Life" slogan or logo. Plaintiffs contend that this statute infringes their First and Fourteenth Amendment rights. Further, Plaintiffs contend that, because it gives

the General Assembly unbridled discretion to determine whether to grant or deny a proposed specialty plate, the Tennessee specialty license plate program in general infringes Plaintiffs' constitutional rights through viewpoint discrimination.

MOTIONS TO DISMISS

In considering a Motion to Dismiss, the Court must accept as true all factual allegations in the Complaint. *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 996 (6th Cir. 1994). The Motion should be granted only if it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Id.*

STANDING

The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 403 (6th Cir. 1999). Constitutional limitations on standing require that there be an actual case or controversy. *Id.*

The U.S. Supreme Court has held that "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). First the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of — the

injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of a third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.*; *Lac Vieux*, 172 F.3d at 403.

Defendants argue that Plaintiffs have no standing to bring their challenge to the Choose Life statute because they cannot show it is likely that their injury will be redressed by a favorable decision.[1] Citing cases from the Eleventh and Fifth Circuits, Defendants contend that declaring the Choose Life statute to be unconstitutional does nothing to redress Plaintiffs' injury of inability to express themselves. Docket No. 35, p.8. Defendants, in short, argue that even if the Choose Life license plate is declared unconstitutional, Plaintiffs still do not get a Pro-Choice license plate to express their views.

Plaintiffs' alleged injury is not simply the inability to express themselves in a state-created forum, however. Plaintiffs are also allegedly injured by having their opposing viewpoint drowned out through exclusion from the government forum. The organizational Plaintiffs' alleged injury is the statutory impediment to their ability and First Amendment right to speak in a state-run public forum to attempt to build public support for protecting access to safe and legal abortions. Complaint (Docket No.1), ¶¶ 4 and 5.

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[1] Defendants, for purposes of the pending Motions regarding the challenge to the Choose Life statute, do not contest the first (injury) or second (causal connection) elements of the *Lujan* test for standing.

If the Court were to order Plaintiffs' requested relief and declare the "Choose Life" license plate statute to be unconstitutional, *neither* viewpoint would be favored in this state-sponsored forum. In other words, neither viewpoint would have the power, prestige and imprimatur of the State of Tennessee behind it. Leveling the playing field for speech in this way would redress Plaintiffs' alleged injuries.

Further, the Supreme Court has noted that:

> [W]e have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class. To the contrary, we have noted that a court sustaining such a claim faces "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.

Heckler v. Matthews, 104 S. Ct. 1387, 1395 (1984). A person or group excluded from benefits conveyed via an underinclusive statute has standing to challenge the statute on constitutional grounds, even if the effect of striking down the statute is to deny the benefit to the intended group and not extend it to the plaintiffs. *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564, 568 (D.S.C. 2002) (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8, 109 S.Ct. 890, 895 (1989) and other cases).

Based upon these authorities, the Court finds that Plaintiffs have standing to bring their first claim regarding the Choose Life statute. Accordingly, Defendants' Motions to Dismiss on this basis are DENIED.

Defendants' next argument concerns Plaintiffs' attack on the specialized license plate program in general. Defendants contend that Plaintiffs cannot establish the first element required for standing regarding this claim, that of injury-in-fact.[2] Docket No. 35, p. 11. Defendants assert that Plaintiffs have never been subject to the legislative process of specialty license plate issuance in Tennessee and, therefore, cannot have been injured thereby. Defendants, more specifically, assert that because a Pro-Choice license plate bill has not been introduced in the General Assembly, the legislature is silent on the issue and thus Plaintiffs have not been injured. Again citing cases from other Circuits, Defendants argue that Plaintiffs have no standing to bring this claim unless and until they apply to the General Assembly for a specialty license plate and are rejected.

Plaintiffs' claim is a facial challenge to the policy and practice, as reflected in the Tennessee statutes, of issuing specialty license plates. That policy and practice gives discretion, which Plaintiffs allege to be "unbridled," in the Tennessee General Assembly to adopt or not adopt statutes authorizing specialty license plates. *E.g., see* TENN. CODE ANN. § 55-4-202(d)(l).

[2] Defendants, for purposes of the pending Motions regarding the specialized license plate program, do not contest the second (causal connection) or third (redressability) elements of the *Lujan* test for standing.

The General Assembly, according to Plaintiffs, is engaging in the standardless licensing of speech, through unbridled discretion, in order to decide what speech the State officially favors and disfavors. Facial attacks on the discretion granted a governmental decisionmaker are not dependent on the facts surrounding any particular permit decision. *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564, 569 (D.S.C. 2002).

Where First Amendment rights are at issue, an expanded rule of standing must be applied, especially where, as here, the actual or possible exercise of unbridled discretion by public officials is at issue. *Planned Parenthood v. Rose*, 236 F. Supp. 2d 564, 568 (D.S.C. 2002).

> If licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. A facial challenge lies whenever a licensing law gives to a government official or agency substantial power to discriminate based on the context or viewpoint of speech by suppressing disfavored speech or disliked speakers.

Id. (quoting 15 *Moore's Federal Practice* § 101.61[5][b](ii)); *see also Lac Vieux*, 172 F.3d at 407.

Here, as in *Rose*, the Court finds that Plaintiffs have standing "to mount a facial challenge to the statute

without having applied for the issuance of a license plate bearing a slogan of their own choice." *Rose* at 570. Standing, moreover, does not pivot on whether Plaintiffs have engaged lobbyists or petitioned legislators to introduce competing legislation. In any event, the Complaint (Docket No. 1), ¶ 16, reflects that Plaintiffs have sufficiently exhausted any required legislative remedies and failed. There is no constitutionally significant difference, for purposes of standing, between asking the General Assembly to amend a bill versus asking the General Assembly to introduce a bill. Accordingly, Plaintiffs have standing to make their claim that the general practice and policy of issuing specialty license plates in Tennessee is unconstitutional.

Finally, Defendants move to dismiss the challenge to the specialty license plate program on the ground that it is not ripe for review. Defendants assert that the case is premature and any injury is speculative. The Defendants' position is without merit for the same reasons that Plaintiffs have standing to challenge the constitutionality of the specialty license plate program.

CONCLUSION

For all these reasons, Defendants' Motions to Dismiss (Docket Nos. 34 and 50) are DENIED.

IT IS SO ORDERED.

/s/ Todd J. Campbell
UNITED STATES DISTRICT JUDGE

TENN. CODE ANN. § 55-4-306. Registration plates; Choose Life

(a) An owner or lessee of a motor vehicle who is a resident of this state, upon complying with state motor vehicle laws relating to registration and licensing of motor vehicles and paying the regular fee applicable to the motor vehicle and the fee provided for in § 55-4-203, shall be issued a Choose Life new specialty earmarked license plate for a motor vehicle authorized by § 55-4-210(c).

(b) The new specialty earmarked license plates provided for in this section shall contain an appropriate logo and design. Such plates shall be designed in consultation with a representative of New Life Resources.

(c) The funds produced from the sale of Choose Life new specialty earmarked license plates shall be allocated to New Life Resources in accordance with the provisions of § 55-4-215. Such funds shall be used exclusively for counseling and financial assistance, including food, clothing, and medical assistance for pregnant women in Tennessee.

(d)(1) Funds produced by the sale of license plates pursuant to this section shall also comply with the provisions of this subsection (d).

(2)

New Life Resources
"Choose Life" Plate Proceeds

$14,000 estimated gross Year 1 (1,000 plates at $14 each)

	Year 1 Proposed Budget	Year 2 Proposed Allocations
Outreach 30% Care and Concern Brochure (Guide to Pregnancy Resource Centers in Tennessee)	$1,500.00	
Operation of Toll-Free Helpline	$1,500.00	
Membership in Adoption Coalitions across the state and participation in adoption conference and fairs. Total Outreach	$1,000.00 $4,000.00	Outreach to be maintained at 30% of Gross Plate Proceeds
Awareness 35% Statewise advertising campaigns promoting adoption. Promotion of toll-free helpline. Radio ads Newspaper ads Billboards Yellow Pages Total Awareness	 $5,000.00 $5,000.00	Awareness to be maintained at 35% of Gross Plate Proceeds
Direct Assistance 35% Reimburse partner agencies for programs and services promoting adoption, parenting skills,	$5,000.00	Direct Assistance to be maintained at 35% of

abstinence, pregnancy, nutrition, childbirth, and childhood development.		Gross Plate Proceeds
Total Direct Assistance	$5,000.00	
Total	$14,000.00	

(3) New Life Resources is a 501(c)(3) nonprofit organization incorporated in 1995 to provide resources for women and families facing difficult or unexpected pregnancies. "Choose Life" Plate proceeds will be used to coordinate statewide awareness campaigns, a toll-free helpline and to reimburse social service providers who prepare adoptions throughout the state for services and programs targeting at-risk women and families.

(4) Disbursement of funds shall begin within forty-five (45) days of receiving the first plate proceeds. As the number of plates sold increases, additional funding will be used to increase each line item above.

(5) As a 501(c)(3), New Life Resources may not use any funds for the purposes of lobbying, promoting legislation or the election or defeat of any political candidate.

(6)(A) The nonprofit agencies identified in this subdivision (d)(6)(B) shall maintain a partnership with New Life Resources for purposes of providing adoption social services at no cost to Tennessee's at-risk women and families.

(B) Upon establishment of criteria for service

reimbursement, no less than 35% of plate proceeds will be directed to the following agencies to be used in providing direct assistance to clients:

A Woman's Place	1020 South Garden Street Columbia, TN 38401
AAA Women's Services	6232 Vance Road Chattanooga, TN 37421
Abortion Alternatives & CPC	516 Houston Ave. Suite 202 Bristol, TN 37260
Abortion Alternatives & CPC	818 West G. Street Elizabethton, TN 37643
Abortion Alternatives Christian Services	817 W. Walnut Street, #5A Johnson City, TN 37604
Agape House	210 Oakland Martin, TN 38237
Bethany Christian Services	400 S. Germantown Road Chattanooga, TN 37411
Bethany Christian Services	5816 Kingston Pike Knoxville, TN 37919
Bethany Christian Services	1200 Division Street Nashville, TN 37203
Birth Choice Inc.	118 North Wilson Brownsville, TN 38012
Birth Choice Women's	391 Wallace Road

Resource Center	Jackson, TN 38305
Birthright--Jackson	239-C North Parkway Jackson, TN 38305
Care Net Pregnancy Services	305 South Main Street Dickson, TN 37055
Caring Choices of Catholic Charities	30 White Bridge Road Nashville, TN 37205
Choices Resource Center	140 E. Division Rd. Ste. C-2 Oak Ridge, TN 37831
Choose Life/Save-A-Life	P.O. Box 1022 Fayetteville, TN 37334
Crisis Pregnancy Center of Cookeville	694 S. Willow Street Cookeville, TN 38501
First Choice Pregnancy Counseling	503 Madison Street Shelbyville, TN 37160
Full Circle Pregnancy Resources	108 Green Street Athens, TN 37303
Heart to Heart	133 W. Pleasant Covington, TN 38019
Crisis Pregnancy Support Center	325 North Second Street Clarksville, TN 37041
Hope Clinic	1810 Hayes Street
Hope For Life	106 Blevins Road Rogersville, TN 37857
Hope Resource Center	2700 Painter Ave. Knoxville, TN 37919
Life Choices	503 Tucker Dyersburg, TN 38024
Life Choices	2235 Covington Pike, Suite 14

	Memphis, TN 38128
Life Outreach Center	P.O. Box 721 Jefferson City, TN 37760
Birth Right Of Memphis	115 Alexander Memphis, TN 38119
Mercy Ministries	15328 Old Hickory Blvd. Nashville, TN 37211-2042
Miriam's Promise	37 Rutledge St. Nashville, TN 37210
Mid-South Christian Services	920 Estate Drive, Suite 5 Memphis, TN 38119
New Hope Care Center	4526 Mouse Creek Road NW Cleveland, TN 37312
New Life Family Center	4802 Charlotte Ave. Nashville, TN 37209
Open Arms	336 N. Spring Street Sparta, TN 38583
Plateau Pregnancy Services	99 Walker Hill Street Crossville, TN 38557
Pregnancy Care Center of Warren County	100 Center Street, Ste. B McMinnville, TN 37110
Pregnancy Help Center	137 S. College Street Lebanon, TN 37087
Pregnancy Resource Center	718 Neff Street Maryville, TN 37804
Pregnancy Support Center	745 S. Church Street

	Murfreesboro, TN 37130
Cumberland Crisis Pregnancy Center	394 West Main Street, Ste. A-7 Hendersonville, TN 37075
Small World Ministries	401 Bonnaspring Dr. Hermitage, TN 37076
Tennessee Baptist Children's Homes	6896 Hwy 70 Memphis, TN 38133
Tennessee Baptist Children's Home	P.O. Box 519 Franklin, TN 37065
Tomorrow's Hope Pregnancy Care Center	204 W. Blythe Paris, TN 38242
Women's Care Center	1332 Market St. Dayton, TN 37321
Women's Care Center	304 Eastgate Road Sevierville, TN 37862
A Secret Place for Newborns of Tennessee Inc.	P.O. Box 4276 Maryville, TN 37802-4276
Snap Special Needs Adoption Goodwill Homes for Children	4590 Goodwill Road Memphis, TN 38109

TENN. CODE ANN. § 55-4-201. Issuance; fees

(a)(1) All cultural, specialty earmarked and new specialty earmarked motor vehicle registration plates, memorial motor vehicle registration plates and special purpose motor vehicle registration plates now, or in the future, shall be issued and renewed pursuant to the provisions of this part. No plate, other than those issued under part 1 of this chapter, shall be issued or renewed unless authorized in this part.

(2) For the purposes of this part and part 3 of this chapter, "this part" means this part and part 3 of this chapter.

(b) All plates issued pursuant to this part shall be issued and renewed subject to the following:

(1) Payment of the applicable registration fee, except as specifically provided otherwise by § 55-4-203 or any other applicable provision of this part;

(2) An additional fee of twenty-five dollars ($25.00) to be paid by the applicant upon issuance and renewal, except as specifically provided otherwise by § 55-4-203 or any other applicable provision of this part; provided, that such fee shall be thirty-five dollars ($35.00) for all cultural, specialty earmarked and new specialty earmarked license plates issued and renewed, or renewable, on or after September 1, 2002.

(3)(A) A minimum order of one hundred (100) plates for collegiate plates as defined by § 55-4-209(4). Collegiate plates for motorcycles, as authorized by § 55-4-210(c), shall be subject to a minimum order of one hundred (100)

plates for each classification of collegiate plates;

(B) A minimum order of at least five hundred (500) plates for all other cultural, specialty earmarked and new specialty earmarked plates. Personalized plates for motorcycles, as authorized by § 55-4-210(c), shall be subject to a minimum order of five hundred (500) such plates; and

(4) A design which shall be approved by the commissioner.

(c)(1) The provisions of subsection (b) shall apply equally to the renewal of any plate issued pursuant to this part; provided, that any plate that fails to meet the minimum requirements of subdivision (b)(3) by December 31, 1999, or for two (2) successive renewal periods thereafter shall not be reissued or renewed, and the commissioner shall notify the Tennessee code commission that the section of Tennessee Code Annotated authorizing the issuance of such plate is, on the basis of such inactivity, to be deemed obsolete and invalid.

(2) Any cultural or new specialty earmarked plate authorized by statute on or after July 1, 1998, shall be subject to the minimum issuance requirements of subdivision (b)(3).

(3) Any plate authorized by this part that qualifies for initial issuance on or after July 1, 1998, shall be subject to the minimum issuance requirements of subdivision (b)(3).

(d) Any plate authorized by this part that has not qualified for initial issuance by December 31, 1999, shall not be

issued and the commissioner shall notify the Tennessee code commission that the section of Tennessee Code Annotated authorizing the issuance of such plate is, on the basis of such inactivity, to be deemed obsolete and invalid.

(e) Notwithstanding the provisions of subsection (d), any plate authorized by statute on or after January 1, 1999, that fails to meet the minimum issuance requirements of subdivision (b)(3)(B) within one (1) year of the effective date of the act authorizing such plate shall not be issued, and the commissioner shall notify the Tennessee code commission that the section of Tennessee Code Annotated authorizing the issuance of such plate is, on the basis of such inactivity, to be deemed obsolete and invalid.

(f) No plate authorized by this part that has failed to meet minimum issuance or renewal requirements and has been deemed obsolete and invalid pursuant to this section, nor a plate substantially the same in appearance or content, shall be eligible for re-issuance pursuant to this part until the expiration of a three-year period beginning on the date such plate, or a plate substantially the same in appearance or content, was deemed obsolete and invalid.

(g) The provisions of subdivision (b)(3) and subsections (c), (d), (e) and (f) shall not apply to the following plates issued pursuant to this part:

(1) Antique motor vehicle;

(2) Dealer;

(3) Disabled;

(4) Emergency;

(5) "Enemy evadees" as certified by the department of veterans affairs;

(6) Firefighter as provided for in § 55-4-241;

(7) General assembly;

(8) Government service;

(9) Honorary consular;

(10) Judiciary;

(11) Memorial;

(12) Metropolitan council;

(13) National guard;

(14) Pearl Harbor survivors;

(15) Sheriff;

(16) United States house of representatives;

(17) United States judge; and

(18) United States senate.

(h) (1) Notwithstanding any provision of this part to the

contrary, any cultural or new specialty earmarked license plate authorized by statute on or after July 1, 2002, shall be subject to a minimum order of at least one thousand (1,000) plates prior to initial issuance. The provisions of this subdivision (h)(1) shall apply equally to the renewal of any cultural or new specialty earmarked plate initially issued on or after July 1, 2002. Any such plate that does not meet the minimum order requirements of this subdivision (h)(1) within one (1) year of the effective date of the act authorizing such plate, or does not meet the renewal requirements for any two (2) successive renewal periods thereafter, shall not be issued, reissued or renewed and shall be deemed obsolete and invalid. The commissioner shall annually notify the executive secretary of the Tennessee code commission of the sections of the code authorizing the issuance of plates deemed obsolete and invalid pursuant to the provisions of this subdivision (h)(1).

(2) The provisions of subdivision (h)(1) shall not apply to collegiate plates otherwise administered pursuant to the provisions of this part; provided, that on and after July 1, 2002, collegiate plates for four-year colleges or universities located outside Tennessee shall be subject to a minimum order of at least one thousand (1,000) plates prior to initial issuance by the department. The provisions of this subdivision (h)(2) shall apply equally to the renewal of any collegiate plates for four-year colleges or universities located outside Tennessee initially issued by the department on or after July 1, 2002. Any such plate that does not meet the minimum order requirements of this subdivision (h)(2) or does not meet the renewal requirements for any two (2) successive renewal periods, shall not be administratively issued, reissued or renewed

by the department and shall be deemed obsolete and invalid.

(3)(A) Notwithstanding any provision of this part to the contrary, between July 1, 2002, and August 31, 2002, any cultural license plate authorized by § 55-4-264 shall be subject to a minimum order of at least two hundred fifty (250) plates prior to initial issuance. The provisions of subdivision (h)(3)(A) shall apply equally to the renewal of any cultural license plate authorized by § 55-4-264 and initially issued between July 1, 2002, and August 31, 2002. Any such plate that does not meet the minimum order requirements of subdivision (h)(3)(A) or does not meet the renewal requirements for any two (2) successive renewal periods, shall not be administratively issued, reissued or renewed by the department and shall be deemed obsolete and invalid.

(B) On or after September 1, 2002, any cultural license plate authorized by § 55-4-264 shall be subject to a minimum order of at least one thousand (1,000) plates prior to initial issuance. The provisions of subdivision (h)(3)(B) shall apply equally to the renewal of any cultural license plate authorized by § 55-4-264 and initially issued on or after September 1, 2002. Any such plate that does not meet the minimum order requirements of subdivision (h)(3)(B) or does not meet the renewal requirements for any two (2) successive renewal periods, shall not be administratively issued, reissued or renewed by the department and shall be deemed obsolete and invalid.

(i) The comptroller of the treasury shall conduct a performance audit of the department of safety's policies,

procedures and directives as to the administration of this part, relative to special license plates. Such audit shall include, but shall not be limited to, an analysis of the fees collected versus the costs of manufacturing, issuing and administering such special license plates, and an examination of the associated costs of special license plates, including the costs of county clerks in storage, handling and issuance of such special license plates. The office of the comptroller of the treasury shall report its findings and recommendations to the transportation committee of the senate and to the transportation committee of the House of Representatives on or before February 5, 2003.

(j) All funds produced from the sale or renewal of cultural, specialty earmarked and new specialty earmarked license plates shall be used exclusively in Tennessee to support departments, agencies, charities, programs and other activities impacting Tennessee, as authorized pursuant to the provisions of this part.

TENN. CODE ANN. § 55-4-203. Fees

(a) In addition to title, registration, transfer or other fees or taxes otherwise applicable under this title, persons applying for and receiving registration plates under this part shall pay additional fees as follows:

(1) Antique motor vehicle--twenty-five dollars ($25.00) pursuant to § 55-4-111(a)(1) Class C and as provided for in § 55-4-111(b);

(2) Dealers, as provided for in § 55-4-221;

(3) Disabled--regular fee applicable to the vehicle, except as expressly provided otherwise in § 55-21-103;

(4) Emergency:

(A) Amateur radio:

(i) Regular fee applicable to the vehicle, if the applicant meets the qualifications of § 55-4-229(e); or

(ii) Twenty-five dollars ($25.00), if the applicant does not meet the qualifications of § 55-4-229(e);

(B) Regular fee applicable to the vehicle and as provided for in § 55-4-222 for the following special purpose plates:

(i) Auxiliary police;

(ii) Civil air patrol;

(iii) Civil defense;

(iv) Emergency services squad, including, but not limited to, emergency medical technicians and paramedics; and

(v) Rescue squad;

(C) Police officer--regular fee applicable to the vehicle and as provided for in § 55-4-222(f); and

(D) Trauma physicians--regular fee applicable to the vehicle and as provided for in § 55-4-222(g);

(5) Firefighter--regular fee applicable to the vehicle and as provided for in § 55-4-241;

(6) General Assembly--twenty-five dollars ($25.00);

(7) Government service--as provided for in § 55-4-223;

(8) Judiciary--twenty-five dollars ($25.00);

(9) National guard: enlisted, officers, retirees and honorably discharged members--as provided for in § 55-4-228;

(10) Sheriff--twenty-five dollars ($25.00);

(11) Street rod--fifty dollars ($50.00) and as provided for in § 55-4-230;

(12) United States House of Representatives--twenty-five dollars ($25.00);

(13) United States Judge--twenty-five dollars ($25.00); and

(14) United States Senate--twenty-five dollars ($25.00).

(b) The following plates shall be issued free of charge and in the number specified by the section authorizing the issuance of the individual plate; provided, that the appropriate criteria are met by the applicant:

Memorial:

(1) Air Force Cross recipients;

(2) Disabled Veterans, including those disabled veterans who choose to receive the Purple Heart plate pursuant to § 55-4-239(e);

(3) Distinguished Service Cross recipients;

(4) Former Prisoner of War;

(5) Medal of Honor recipients; and

(6) Navy Cross recipients.

(c)(1) The following military cultural plates shall be issued upon the payment of the regular registration fee and a fee equal to the cost of actually designing and manufacturing the plates; provided, that the issuance of such plates shall be revenue neutral:

(A) Bronze Star recipients;

(B) Combat veterans;

(C) "Enemy Evadees" as certified by the Department of Veterans' Affairs, pursuant to § 55-4-243;

(D) Handicapped Veteran;

(E) Holders of the Purple Heart, pursuant to § 55-4-239;

(F) Honorably discharged veterans of the United States Armed Forces, pursuant to § 55-4-253;

(G) Marine Corps League;

(H) Pearl Harbor survivors, pursuant to § 55-4-238;

(I) Silver Star recipients;

(J) United States Military, active forces, pursuant to § 55-4-244;

(K) United States Military, retired, pursuant to § 55-4-244;

(L) U.S. reserve forces pursuant to § 55-4-242; and

(M) U.S. reserve forces, retired, pursuant to § 55-4-244.

(2) Notwithstanding any provision of law to the contrary, the payment of the fee equal to the cost of actually designing and manufacturing the plates provided in subdivision (c)(1) shall only be applicable upon initial issuance or re-issuance of the plates specified in

subdivision (c)(1) and shall not be applicable at the time of renewal.

(d) All other cultural, specialty earmarked and new specialty earmarked plates authorized by this part shall be issued upon the payment of a fee of twenty-five dollars ($25.00) in addition to the regular registration fee; provided, that such fee shall be thirty-five dollars ($35.00) for all such plates issued on or after September 1, 2002, in accordance with the provisions of § 55-4-201(b)(2).

TENN. CODE ANN. § 55-4-215. Revenue from new specialty earmarked plates; allocation

(a) Effective July 1, 1998, and for all subsequent fiscal years, all revenues produced from the sale or renewal of new specialty earmarked motor vehicle registration plates, as defined in § 55-4-209, after deducting the expense the department has incurred in designing, manufacturing and marketing such plates, shall be allocated as follows:

(1) Fifty percent (50%) of such funds shall be allocated to the nonprofit organization or state agency or fund earmarked to receive such funds by the statute authorizing the issuance of such plate. Such funds shall be used solely to fulfill the purpose or to accomplish the goal specified in the statute authorizing the issuance of such plate;

(2) Forty percent (40%) of such funds shall be allocated to the Tennessee arts commission created in title 4, chapter 20; and

(3) Ten percent (10%) of such funds shall be allocated to the state highway fund.

(b) The revenues allocated to the Tennessee arts commission pursuant to subdivision (a)(2) shall be distributed by the arts commission in the form of grants to arts organizations or events which meet criteria established by the arts commission for receiving grants, within the following parameters:

(1) One third (1/3) of such funds shall be distributed to

qualifying arts organizations or events in urban counties; and

(2) Two thirds (2/3) of such funds shall be distributed to qualifying arts organizations or events in rural counties.

(3) For the purposes of this section, "urban counties" are those counties that are included within a metropolitan statistical area, as defined by the federal office of management and budget and as enumerated in the most current edition of *Tennessee Statistical Abstract*. "Rural counties" are those counties that are not included within a metropolitan statistical area, as defined by the federal office of management and budget.

(4) Before the revenue allocated in subdivisions (b)(1) and (b)(2) are granted to the particular local arts organizations or events, an amount not to exceed three hundred ninety three thousand six hundred dollars ($393,600) may be expended for other grants and activities as determined by the commission.

(c) It is the legislative intent that funds statutorily earmarked from the sale or renewal of new specialty earmarked plates shall only be allocated to:

(1) A nonprofit organization;

(2) A department, agency or other instrumentality of state government; or

(3) A special reserve fund to be utilized by a state agency to effectuate a purpose deemed to be in the state's best interest.

(d) Nothing in this section shall be construed as reallocating the revenues produced from the regular motor vehicle registration fees, or renewals thereof, imposed by part 1 of this chapter. Such revenues shall be allocated in accordance with the provisions of § 55-6-107.

TENNESSEE SPECIALITY LICENSE PLATE STATUTES

Current Code Sections

TENN. CODE ANN. § 55-4-228. National guard members.
TENN. CODE ANN. § 55-4-230. Street rods.
TENN. CODE ANN. § 55-4-231. Silver and Bronze Star recipients.
TENN. CODE ANN. § 55-4-232. Big Brothers Big Sisters.
TENN. CODE ANN. § 55-4-233. Eagle Scouts.
TENN. CODE ANN. § 55-4-234. Fellowship of Christian Athletes.
TENN. CODE ANN. § 55-4-235. Former prisoners of war.
TENN. CODE ANN. § 55-4-236. Medal recipients.
TENN. CODE ANN. § 55-4-237. Disabled veterans.
TENN. CODE ANN. § 55-4-238. Pearl Harbor Survivors.
TENN. CODE ANN. § 55-4-239. Holders of the Purple Heart.
TENN. CODE ANN. § 55-4-240. Memorial registration plates
TENN. CODE ANN. § 55-4-242. United States reserve forces.
TENN. CODE ANN. § 55-4-243. Enemy evadees.
TENN. CODE ANN. § 55-4-244. United States military – Active and retired members – Military reserves.
TENN. CODE ANN. § 55-4-245. National Fraternal Order of Police members.
TENN. CODE ANN. § 55-4-246. Friends of Big South Fork National Park.
TENN. CODE ANN. § 55-4-247. Penn State University alumnus.

TENN. CODE ANN. § 55-4-249. "Helping schools" volunteers.
TENN. CODE ANN. § 55-4-250. University of Florida alumnus.
TENN. CODE ANN. § 55-4-251. University of Arkansas alumnus.
TENN. CODE ANN. § 55-4-252. Non-game and endangered wildlife species.
TENN. CODE ANN. § 55-4-253. Honorably discharged veterans.
TENN. CODE ANN. § 55-4-255. Nature Conservancy.
TENN. CODE ANN. § 55-4-256. University of Mississippi alumnus.
TENN. CODE ANN. § 55-4-257. Sons of Confederate Veterans.
TENN. CODE ANN. § 55-4-258. Tennessee Police Benevolent Association.
TENN. CODE ANN. § 55-4-259. Tennessee Walking Horse.
TENN. CODE ANN. § 55-4-260. International Association of Firefighters.
TENN. CODE ANN. § 55-4-261. African-American fraternity or sorority members.
TENN. CODE ANN. § 55-4-262. Environmental.
TENN. CODE ANN. § 55-4-263. Supporter of Saint Jude Children's Research Hospital.
TENN. CODE ANN. § 55-4-264. Supporters of the arts.
TENN. CODE ANN. § 55-4-265. Ducks Unlimited.
TENN. CODE ANN. § 55-4-266. Small mouth bass.
TENN. CODE ANN. § 55-4-267. Agriculture.
TENN. CODE ANN. § 55-4-268. Mothers Against Drunk

	Driving.
TENN. CODE ANN. § 55-4-269.	Tennessee Food Bank.
TENN. CODE ANN. § 55-4-270.	East Tennessee Children's Hospital.
TENN. CODE ANN. § 55-4-271.	Friends of Great Smoky Mountains.
TENN. CODE ANN. § 55-4-272.	Olympics.
TENN. CODE ANN. § 55-4-273.	"Children First!"
TENN. CODE ANN. § 55-4-274.	Radnor Lake.
TENN. CODE ANN. § 55-4-275.	Tennessee Titans.
TENN. CODE ANN. § 55-4-277.	Tennessee Wildlife Federation.
TENN. CODE ANN. § 55-4-278.	Registration plate for a motorcycle owner or lessee eligible for national guard plate.
TENN. CODE ANN. § 55-4-280.	Eagle Foundation.
TENN. CODE ANN. § 55-4-281.	Fish and Wildlife species.
TENN. CODE ANN. § 55-4-287.	Vanderbilt Children's Hospital.
TENN. CODE ANN. § 55-4-290.	Animal friendly – Animal population control endowment fund.
TENN. CODE ANN. § 55-4-295.	University of Tennessee Lady Volunteers' NCAA National Championships.
TENN. CODE ANN. § 55-4-296.	Sportsman.
TENN. CODE ANN. § 55-4-299.	University of Tennessee National Championship.
TENN. CODE ANN. § 55-4-301.	Prince Hall Masons.
TENN. CODE ANN. § 55-4-302.	Le Bonheur Children's Medical Center.
TENN. CODE ANN. § 55-4-306.	Choose Life.
TENN. CODE ANN. § 55-4-313.	The Children's Hospital

	at Johnson City Medical Center.
TENN. CODE ANN. § 55-4-316.	American Cancer Society Relay for Life.
TENN. CODE ANN. § 55-4-317.	Regional Medical Center at Memphis (The MED).
TENN. CODE ANN. § 55-4-318.	Handicapped veteran.
TENN. CODE ANN. § 55-4-320.	Tennessee Councils of the Boy Scouts of America.
TENN. CODE ANN. § 55-4-321.	The Elephant Sanctuary in Tennessee.

Obsolete Plates

TENN. CODE ANN. § 55-4-232 (2003).	Technology.
TENN. CODE ANN. § 55-4-233 (2003).	Share the road.
TENN. CODE ANN. § 55-4-234 (2003).	Harley Owner's Group (HOG).
TENN. CODE ANN. § 55-4-246 (2003).	Tennessee State Guard.
TENN. CODE ANN. § 55-4-248 (2003).	Memphis Zoo.
TENN. CODE ANN. § 55-4-254 (2003).	Civil rights.
TENN. CODE ANN. § 55-4-255 (2003).	Title VI.
TENN. CODE ANN. § 55-4-266 (2003).	Kiwanis International.
TENN. CODE ANN. § 55-4-269 (2003).	Memphis Redbirds.
TENN. CODE ANN. § 55-4-276 (2003).	Memphis Grizzlies.
TENN. CODE ANN. § 55-4-277 (2003).	Nashville Predators.
TENN. CODE ANN. § 55-4-278 (2003).	Proud to be an American.

TENN. CODE ANN. § 55-4-279 (2003). United for America.
TENN. CODE ANN. § 55-4-282 (2003). Memphis and Shelby County Humane Society.
TENN. CODE ANN. § 55-4-283 (2003). City of Oak Ridge.
TENN. CODE ANN. § 55-4-284 (2003). Rocky Mountain Elk Foundation.
TENN. CODE ANN. § 55-4-286 (2003). Ruritan National.
TENN. CODE ANN. § 55-4-288 (2003). Nashville Zoo at Grassmere.
TENN. CODE ANN. § 55-4-289 (2003). State parks.
TENN. CODE ANN. § 55-4-291 (2003). Public television.
TENN. CODE ANN. § 55-4-292 (2003). Retired firefighters.
TENN. CODE ANN. § 55-4-293 (2003). Tennessee Valley Authority 70th Anniversary.
TENN. CODE ANN. § 55-4-294 (2003). Nurses.
TENN. CODE ANN. § 55-4-297 (2003). The Hermitage.
TENN. CODE ANN. § 55-4-298 (2003). Volunteer firefighters.
TENN. CODE ANN. § 55-4-304 (2004). Driving to a Cure (Pink Ribbon).
TENN. CODE ANN. § 55-4-305 (2003). Girl Scouts of the United States of America.
TENN. CODE ANN. § 55-4-308 (2003). America's Promise.
TENN. CODE ANN. § 55-4-309 (2004). Supporters of the Traditional Music Center.
TENN. CODE ANN. § 55-4-310 (2004). Tennessee golf.

TENN. CODE ANN. § 55-4-311 (2004). MAKUS Buckle UP! Drive Safely!
TENN. CODE ANN. § 55-4-212 (2004). Baylor School.
TENN. CODE ANN. § 55-4-214 (2004). Shriners.
TENN. CODE ANN. § 55-4-215 (2004). McCallie School.
TENN. CODE ANN. § 55-4-319 (2004). Organ donation awareness.
TENN. CODE ANN. § 55-4-322 (2004). NASCAR.
TENN. CODE ANN. § 55-4-323 (2004). Autism awareness.

Supreme Court, U.S.
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No. 05-1389

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, PLANNED PARENTHOOD OF MIDDLE AND EAST TENNESSEE, INC., SALLY LEVINE, HILARY CHIZ, JOE SWEAT,
Petitioners,

v.

PHILIP BREDESEN, Governor of Tennessee, GERALD F. NICELY, Interim Commissioner of Safety of Tennessee, NEW LIFE RESOURCES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

STATE RESPONDENTS' BRIEF IN OPPOSITION

PAUL G. SUMMERS
ATTORNEY GENERAL
STATE OF TENNESSEE

MICHAEL E. MOORE
SOLICITOR GENERAL

JOSEPH T. WHALEN
ASSOCIATE SOLICITOR GENERAL

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QUESTION PRESENTED

Whether the State of Tennessee's authorization of a specialty license plate bearing the message "Choose Life" constitutes government speech under this Court's decision in *Johanns v. Livestock Marketing Ass'n,* when the state legislature chose and approved every word of the plate's message and twice rejected a contrary message, with the state retaining ultimate approval authority for the plate's overall design.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 441 F.3d 370 (6th Cir. 2006). Pet. App. A1-A45. The opinion of the district court granting summary judgment and issuing an injunction is reported at 354 F.Supp.2d 770 (M.D. Tenn. 2004). Pet. App. A46-A54. The opinion of the district court denying the motion to dismiss filed by Governor Phil Bredesen and Commissioner Nicely (the "State") is unreported. Pet. App. A55-A62.

STATEMENT OF JURISDICTION

On March 17, 2006, the United States Court of Appeals for the Sixth Circuit issued a decision reversing the judgment of the district court. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the Sixth Circuit.

STATUTORY PROVISIONS

Pertinent portions of Tennessee Code Annotated § 55-4-306,[1] authorizing a specialty license plate bearing the message "Choose Life," provide:

> (a) An owner or lessee of a motor vehicle who is a resident of this state, upon complying with state motor vehicle laws relating to registration and licensing of motor vehicles and paying the regular fee applicable to the motor vehicle and the fee provided for in § 55-4-203, shall be issued a Choose Life new

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[1] The entire text of the statute is set forth in Petitioners' Appendix at A63-A69.

specialty earmarked license plate for a motor vehicle authorized by § 55-4-210(c).

(b) The new specialty earmarked license plates provided for in this section shall contain an appropriate logo and design. Such plates shall be designed in consultation with a representative of New Life Resources.

(c) The funds produced from the sale of Choose Life new specialty earmarked license plates shall be allocated to New Life Resources in accordance with the provisions of § 55-4-215.[2] Such funds shall be used exclusively for counseling and financial assistance, including food, clothing, and medical assistance for pregnant women in Tennessee.

FACTUAL BACKGROUND

In 2003, the Tennessee General Assembly enacted Tenn. Code Ann. § 55-4-306 (the "Act"), which became law without the signature of the Governor. The Act authorized the Commissioner of Safety to produce and issue specialty license plates bearing the words "Choose Life" upon the commitment of 1,000 Tennessee citizens to purchase the plate

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[2] Tenn. Code Ann. § 55-4-215 provides that, after deducting the State's cost in designing, manufacturing, and marketing a specialty license plate, forty percent (40%) of the remaining additional funds from the sale of the plate are allocated to the Tennessee Arts Commission, ten percent (10%) to the state highway fund, and fifty percent (50%) to the entity identified in the authorizing statute. Pet. App. A82-A84.

at a cost of $35 above the cost of the standard plate.[3] During Senate debate of the Act, a state senator unsuccessfully proposed amending the legislation to authorize a specialty plate bearing a pro-choice message.[4]

The Act authorizes the production of a license plate bearing a "Choose Life" message with an appropriate logo and design, with the Commissioner of Safety designing the plate in consultation with New Life Resources. Tenn. Code Ann. § 55-4-306.

PROCEDURAL HISTORY

On November 6, 2003, Petitioners ACLU of Tennessee, Planned Parenthood of Middle and East Tennessee, Inc., Sally Levine, Hilary Chiz, and Joe Sweat, ("petitioners"), filed an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Tennessee alleging the violation of their rights secured by the First and Fourteenth Amendments to the United States Constitution. Complaint, R. 1. Petitioners alleged that the State had opened

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[3] The State of Tennessee has a system for authorizing and issuing specialty license plates that begins with the Tennessee General Assembly passing separate legislation for each plate it wishes to authorize. After a specialty plate is authorized, a minimum order of that plate, in this instance 1,000 plates, must be confirmed before it may be produced and issued. The process ends with the Commissioner of Safety, who, in his discretion, designs and may issue the plates authorized by the General Assembly. An additional fee, over the cost of a standard license plate, is charged annually for each specialty plate issued. *See* Tenn. Code Ann. § 55-4-201. Pet. App. A70-A76.

[4] In 2004, a similar amendment authorizing another pro-choice specialty license plate was presented and defeated again.

a state-created forum to one viewpoint alone in violation of the First and Fourteenth Amendments. *Id.* at 2. Petitioners further alleged that the State of Tennessee's policy and practice of issuing specialty license plates violated their rights secured by the First and Fourteenth Amendments. *Id.* Petitioners sought declaratory and injunctive relief declaring the Act unconstitutional and enjoining the issuance of the "Choose Life" specialty license plate. *Id.* at 9. In the alternative, petitioners sought declaratory and injunctive relief declaring the policies and practices of authorizing specialty license plates unconstitutional and enjoining the authorization and issuance of all specialty license plates authorized by Tenn. Code Ann. §§ 55-4-228 – 308. *Id.*

New Life Resources, Inc. ("New Life Resources"), filed a motion to intervene as of right or, in the alternative, for permissive intervention. The district court granted New Life Resources' motion to intervene under the theory of permissive intervention, choosing not to address whether New Life Resources qualified as an intervenor as of right.

Subsequently, the State filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) asserting that the court lacked subject matter jurisdiction, that petitioners did not have standing, and that the case was not ripe for consideration. On March 12, 2004, the State's motion to dismiss was denied. Pet. App. A55-A62.

Petitioners, the State, and New Life Resources filed cross-motions for summary judgment. The district court denied the State's and New Life Resources' motions for summary judgment and granted petitioners' motion for summary judgment, declaring the Act unconstitutional and enjoining its enforcement. The district court withheld ruling on the

constitutionality of the policy and practice of issuing specialty license plates in Tennessee. Pet. App. A53-A54.

New Life Resources appealed the ruling of the district court. The State, however, did not. On March 17, 2006, the Sixth Circuit issued its decision reversing the district court and finding that the Act was constitutional under this Court's recently issued opinion in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). Pet. App. A1-A21. The court of appeals reasoned that the "Choose Life" message on the specialty license plate is government speech that was disseminated by private individuals. *Id.* at A11-A21.

Petitioners now seek this Court's review of the Sixth Circuit's decision. The State opposes the granting of the petition.

REASONS FOR DENYING REVIEW

THE SIXTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT BECAUSE IT IS THE FIRST CIRCUIT COURT TO HAVE THE BENEFIT OF EXAMINING THE "CHOOSE LIFE" SPECIALTY LICENSE PLATE UNDER THE FRAMEWORK ESTABLISHED BY THIS COURT IN *JOHANNS* FOR DETERMINING WHETHER SPEECH IS GOVERNMENT SPEECH.

Petitioners urge this Court to grant certiorari because, they allege, the decision of the Sixth Circuit here is in direct conflict with the Fourth Circuit's decision in *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786 (4th Cir. 2004) ("*PPSC*"). But *PPSC* was decided prior to, and thus

without the benefit of, this Court's decision in *Johanns,* which set forth the standard for determining "government speech."[5] Indeed, in *PPSC* itself, the Fourth Circuit observed that at the time it decided that case, "[n]o clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions." *Id.* at 792-93.[6]

Johanns arose from the United States Department of Agriculture's use of a checkoff funding system to fund promotional projects, including television and print advertising for the purpose of promoting beef products. *Johanns*, 544 U.S. at 554-55. Respondents in that case claimed, among other things, that the use of the challenged beef checkoff system violated their rights secured by the First

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[5] The court in *PPSC* also recognized that it based its decision on the theory that speech can be both governmental and private at the same time, a theory the court admitted had not been adopted by this Court. *See* 361 F.3d at 795.

[6] The *Johanns* test for government speech was not applied in the Second and Fifth Circuit cases referenced by petitioners or by the dissenting judge below. Pet. 15-16; Pet. App. A22, n.1. In a non-precedential opinion, the Second Circuit addressed a situation opposite to that presented in this case. The State of New York merely appealed the denial of its motion to dismiss based upon qualified immunity in a case brought to force the state to produce and issue a Choose Life license plate. *Children First Foundation, Inc. v. Martinez*, 2006 WL 544502 (2d Cir. March 6, 2006)(unpublished). The Fifth Circuit found no subject matter jurisdiction to consider challenges to Louisiana's "Choose Life" plate or its speciality license plate scheme due to the Tax Injunction Act. The Fifth Circuit did not reach the question whether the Choose Life specialty plate is government speech. *Henderson v. Stalder*, 407 F.3d 351, 354-60 (5th Cir. 2005), *petition for cert. filed sub nom, Keeler v. Stalder*, No. 05-1222 (Mar. 21, 2006).

Amendment. *Id.* at 555. In considering the issue, this Court stated that, while the Court had considered the ramifications of compelled subsidy cases in which an individual is forced to subsidize private speech with which he disagrees, the Court had "not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech."[7] *Id.* at 557.

In deciding *Johanns*, this Court first determined whether the speech present in that case was government speech or private speech. *Id.* This Court, in broad terms stated, "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government." *Id.* at 560. This Court cited the following facts as weighing in favor of a finding that the speech was government speech: (1) that the speech was ultimately controlled by the government; (2) that the message is established by the government; (3) that the government specified in general terms the substance of the speech;[8] (4) that the government

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[7] Petitioners contend that *Johanns* is inapposite because it is a compelled speech case. (Pet. at 18-19). This contention, however, is flawed. While *Johanns* was a compelled speech case, this Court in *Johanns* had to first examine the speech present in that case to decide whether it was government or private speech, an issue wholly separate from whether the government could use a checkoff system to compel that speech. *See Johanns*, 544 U.S. at 557-68. It is this examination of the speech that the Sixth Circuit correctly relied upon and that the State now emphasizes as a critical factor in determining whether there is a circuit split.

[8] This Court in *Johanns* found that the above three factors amounted to the government "set[ting] out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to" the government. *See Id.* at 561.